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Office Supreme Court,
FILED
APR 10 1933
CHARLES ELMORE CROPLEY

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

STATE OF WISCONSIN, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 5 Original.
STATE OF MICHIGAN, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 8 Original.
STATE OF NEW YORK, et al., *vs.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO, et al.	No. 9 Original.

BRIEF ON BEHALF OF THE STATE OF ILLINOIS IN OPPOSITION TO REPORT OF SPECIAL MASTER McCLENNEN.

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INTRODUCTION AND OUTLINE OF BRIEF.

Before explaining the nature of the brief herein submitted on behalf of the State of Illinois, comment on the state of the record is required. The Special Master introduces his report by the statement that he has noted therein the objection of the parties. The court directed

in this case a summary proceeding and interpreting this requirement, the Special Master allowed counsel an opportunity to see a tentative draft of his proposed report. This was submitted immediately upon conclusion of the oral argument and many of its provisions and recommendations were necessarily not considered by counsel in that argument. He allowed five days in which counsel could send to him in Boston suggestions for modification of his tentative report. The argument took place in Washington. Counsel for the State of Illinois therefore was unable, within the time permitted, to submit specific suggestions for modification. As a result the statement that the objections on behalf of the State of Illinois have been noted is not entirely accurate. In the main the report is correct as to our objection but the State objects to the report generally and should not be precluded on this record from pressing for consideration any contention.

The first two questions submitted by the order of reference to the Special Master deal with performance by the Sanitary District and particularly with details in its construction program. They also peculiarly involve consideration of the charges of bad faith pressed by the complainants. The State of Illinois joins with and affirms the contentions submitted as to the Master's conclusions on these two questions by the Sanitary District, and particularly desires to repudiate the implications of bad faith, which we submit are unfairly suggested in the Master's Report. But the State in this brief will not discuss these two questions except as they are necessarily involved in the choice of remedies—a matter definitely comprehended in the third question.

The third question in the order of reference directed the Master to report:

"(3) As to the financial measures on the part of

the Sanitary District or the State of Illinois which are *reasonable* and necessary in order to carry out the decree of this court." (Italics ours.)

In considering this question the Master has found an interruption to the going forward by the Sanitary District in carrying out of its program for artificial treatment of sewage, and has further found that this interruption has occurred from causes not within the control of the Sanitary District. *The Master has, however, wrongly assumed that the mere existence of this interruption presents an emergency.* His assumption is that the restoration of the rights of the complaining states is so imperative as to compel, in dealing with this emergency, any remedy, however extraordinary or doubtful, which might conceivably lie within the authority of this court.

In this brief we propose, first, to direct the court's attention to certain facts apparent in this record to which, as we contend, the Master has failed to give sufficient or any consideration. These facts demonstrate, as we see it, that notwithstanding the interruption to the program, the "just rights of the complainant states," limited solely to the restoration of lake levels, will be produced by other agencies at a time sooner than if the original decree herein were fully and completely complied with. This situation, to which the Master gave no attention, entirely changes the character of any claimed emergency.

We shall then discuss the impractical nature of the recommendations submitted by the Master, which we contend are entirely unreasonable, and particularly so when contrasted with the extent of the actual emergency as affected by the facts last above referred to. We shall then discuss the question as to whether the State of Illinois is primarily liable; whether this case has involved

a fair and final determination of such liability, and shall urge the constitutional right of the State of Illinois to leave financial responsibility for the acts of the Sanitary District solely upon the District.

Finally we shall discuss the very grave questions presented by the Master's Report as to the nature of the power of the Supreme Court, which he recommends should now be asserted.

I.

FACTS OF RECORD GIVEN INSUFFICIENT OR NO CONSIDERATION BY THE SPECIAL MASTER, SHOW THAT LAKE LEVELS WILL BE RESTORED BY OTHER AGENCIES SOONER THAN IF THE ORIGINAL DECREE HEREIN WERE FULLY CARRIED OUT. THERE EXISTS, THEREFORE, NO PRESENT EMERGENCY CALLING FOR THE IMMEDIATE APPLICATION OF ADDITIONAL OR EXTRAORDINARY EQUITABLE REMEDIES. ON THE CONTRARY THE DECREE SHOULD NOW BE MODIFIED TO ALLOW TO THE SANITARY DISTRICT REASONABLE OPPORTUNITY TO AWAIT THE END OF THE DEPRESSION.

The Special Master's report finds that the Sanitary District, through causes not under its control, has been compelled to interrupt progress of its sewage disposal construction program for more than one and a half years. These causes—the failure to collect taxes and the inability to sell bonds—are clearly the consequences of the business depression. Postponement in enforcing an immediate injunction stopping all diversion by the Sanitary District for sanitation purposes was originally allowed and required by the Court in this case, solely for the reason that such immediate cessation of diversion would endanger the lives and health of the people of Cook County. Clearly the decree must be modified to accommodate its requirements to the delay which has

already taken place and the further delay which is inevitable. This accommodation is required by the same compelling humanitarian necessity which originally induced the Court to postpone the final stoppage of diversion.

We point out below that the ultimate result of stopping the diversion—the restoration of lake levels—is required to be accomplished by other agencies, under appropriate action of Congress; and, if adopted, under the express provisions of the pending Canadian-St. Lawrence Seaway Treaty, and at a date sooner than would be accomplished if the decree had in all particulars been met. We assert therefore, there does not at present exist any emergency whatever calling for the adoption of extraordinary remedies, since the accomplishment of this ultimate result is the entire measure of the relief allowed the complaining states herein.

We also point out below that the jurisdiction of this Court has been altered and limited by an Act of Congress adopted since the decree. This statute compels legal attention to navigation benefits resulting from the diversion which the Court held originally, because of failure of Congress to act, could not be given consideration. The action whose omission so resulted has now taken place. The Court's original decree gave consideration only to the navigation requirements of the Chicago harbor. By subsequent act of Congress other navigation requirements now must be considered.

By way of emphasizing this requirement, we call the Court's attention to the position taken recently in this case by the original intervening defendant states, Missouri, Kentucky, Tennessee, Arkansas, Mississippi and Louisiana, who applied for leave to appear before the Special Master in this reference and present their contentions in reference to this very issue, with an oppor-

tunity upon the record so made subsequently to ask a modification of the original decree herein. This Court summarily disposed of this application by an order which read: "The motion to modify the decree is denied." The motion, however, was in effect for an enlargement of the reference to permit consideration of this issue. The Special Master has, as we point out below, made a finding on this very point—the extent to which diversion from Lake Michigan will benefit navigation on the waterway from Lake Michigan to the Mississippi below the Sanitary District Canal. These benefits have heretofore been excluded from consideration because of the failure of Congress up to that time to act. The record, therefore, presents this anomalous and, we respectfully submit, improper situation. Not only the State of Illinois but six other states, by formal application, press for consideration navigation benefits resulting from the diversion and point to an act of Congress which eliminates any bar to consideration of these benefits. These intervening defendant states have been denied an opportunity to present their rights. Yet the Special Master has made a finding on this point. As we point out below this finding was improper and obviously the result of misconstruction of the Act of 1930, but in any event the issue, we respectfully suggest, should not be disposed of now without due and proper allowance of an opportunity to the intervening defendant states to present fully their contentions.

For the reasons pointed out below we also respectfully suggest that the jurisdiction of this Court has been modified in the premises, its power to control the diversion is affected by an exercise of the paramount authority of Congress and on this further ground its decree should now be modified.

A.

THE PROVISION OF THE RIVERS AND HARBORS ACT OF 1930 IN REFERENCE TO THE ILLINOIS WATERWAY IS AN EXERCISE OF THE PARAMOUNT AUTHORITY OF CONGRESS AND CALLS UPON THIS COURT TO SO MODIFY ITS DECREE AS TO AVOID ANY POSSIBLE INTERFERENCE THEREWITH. THE SPECIAL MASTER HAS MISCONSTRUED AND MISUNDERSTOOD THE EFFECT OF THIS STATUTE.

In the original opinion herein written by the late Chief Justice Taft the Court affirms the authority of the Secretary of War, on recommendation of the Chief of Engineers, under Section 10 of the Act of March 3, 1899, to authorize a diversion from Lake Michigan which has a reasonable relation to benefits to navigation. The court held that in the absence of a congressional project for the development of a waterway from Lake Michigan to the Mississippi and thence to the Gulf of Mexico, navigation benefits from the diversion to the Illinois and Mississippi Rivers, concerning which adequate findings were made in the Special Master's first report, could not be a legal basis for a permit by the Secretary of War for such diversion. On rereference, therefore, the Special Master was specifically directed to give consideration to the navigation requirements of the Chicago harbor only, and his report on rereference very clearly and definitely shows that his recommendations were made solely from this standpoint, and in strict compliance with the court's direction.

As might be expected in view of the original assertion of the Secretary of War's power, in the second opinion herein written by Mr. Justice Holmes the court makes it clear that its decree and any of the action of the parties shall be subject to any subsequent assertion of the

paramount power of Congress or its lawfully delegated agent, the Secretary of War. The decree herein contains numerous and definite reservations obviously designed to permit this principle to apply.

By the Rivers and Harbors Act of 1930, approved July 3, 1930, Congress adopted what was called the Illinois River item reading as follows:

> "Illinois River, Illinois, in accordance with the report of the Chief of Engineers, submitted in Senate Document Numbered 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway: Provided, That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000; Provided further, That the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered April 21, 1930, and reported in volume 281, United States Reports, in Cases Numbered 7, 11, and 12, Original—October term, 1929, of Wisconsin and others against Illinois, and others, and Michigan against Illinois and others, and New York against Illinois and others, according to the opinion of the court in the cases reported as Wisconsin against Illinois, in volume 281, United States, page 179, is hereby authorized to be used for the navigation of said waterway; Provided further, That as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet the needs of such waterway and that will not substantially injure the existing navigation on

the Great Lakes to the end that Congress may take such action as it may deem advisable."

This adopts as a Federal project the waterway from Lake Michigan to the Mississippi (there being prior projects covering all of the balance of the waterway not specifically described in the above expressions). *As the result of this enactment, applying the theory upon which the court originally acted, it thereby became the duty of the Secretary of War as a matter of law in deciding upon the issue of any permit under Section* 10 *of the Act of* 1899 *to give consideration not only to the navigation benefits resulting from the diversion in the harbor of Chicago, but also in the Illinois waterway.*

This statute specifically directed the Chief of Engineers, *after the project was completed and actual navigation had begun,* to investigate and determine the navigation needs in the waterway for water from Lake Michigan. The Special Master, we submit, in dealing with the effect of this statute has entirely misunderstood its provisions. He says (Report, p. 27):

> "The Act by adopting the report of the Chief of Engineers provided for no larger flow than the decree allows. There is no present Federal project requiring more diversion than the decree allows. There is no indication that Congress will hereafter allow a greater diversion. The provision of the Act for the smallest flow leaves no discretion to the Secretary of War to permit a larger diversion for this project. Congress has exercised its full authority directly, without leaving a part in the hands of the Secretary. * * *"

Each statement above is erroneous.

The first sentence is a complete misconception of what the Act provides. The Act adopts the flow permitted under the decree, but, clearly, only until subsequent action may be taken as a result of the report of the Chief of Engineers called for by the Act. The Act does not

adopt the contemplated report of the Chief of Engineers but leaves action thereon either to Congress itself or to the Secretary of War under the statute of 1899.

The second sentence in the quotation above is an assertion as to the ultimate fact to be determined by the Chief of Engineers in the report directed by the Act. The entire question to be decided by that report is the amount of diversion required for this waterway adopted by the Act. The Master gives no reason for his assertion of this conclusion of fact, and since Congress reserves the question until the report comes in, it would be clearly improper for this Court or the Master now to consider it. As to the third sentence above, it will be sufficient to point out that there is no indication that Congress will not hereafter allow a greater diversion.

As pointed out above six sovereign states have reasserted rights to a lawful consideration of these benefits to navigation. This act of Congress has removed what this court heretofore considered a bar to such consideration.

The most material error, however, is the Master's complete failure to properly interpret the provision in the language above as to the smallest flow required for the diversion. In this connection we contend and have contended before him that it was incumbent upon the Master, and now upon this court, in construing the above provisions of this Act, to give proper consideration and effect to other language in the same statute reading as follows:

> "Great Lakes connecting channels: The existing projects are hereby modified so as to provide a channel suitable for vessels of 24-foot draft when the ruling lake is at its datum plane, *and including the construction of compensation works, as set forth in paragraphs 30, 31, 48, 67, 69, 70, 71, 76, and 77 of the report of the special board of engineers dated*

February 14, 1928, and submitted in House Document Numbered 253, Seventieth Congress, first session. The amount hereby authorized to be expended upon said channels is $29,266,000."

The engineers' report, House Doc. No. 253, contains a letter from Gen. Jadwin, then Chief of Engineers. Sections of the report specifically referred to in the above provision of the statute were offered and received in evidence before the Special Master. The letter of Gen. Jadwin, a part of House Document No. 253, reads in part as follows:

> "The Special Board agrees with the Joint International Board that compensating works should be constructed in Niagara and St. Clair Rivers to compensate for diversion and for enlargement of the lake outlets. The works proposed in the St. Clair River are a series of submerged rock sills, the exact number to be determined as the work progresses, estimated to cost $2,700,000.00. Contraction works are proposed in the Niagara River just above Ft. Erie. They would consist of a rock filled timber crib, a stone weir, and submerged sills, estimated to cost $700,000.00 with $5,000 annually for maintenance. Further enlargement of the St. Clair River to provide for 24 foot or 22 foot navigation would necessitate additional compensating works estimated to cost $200,000.00 for 24 foot navigation and $100,000.00 for 22 foot navigation. The Special Board estimates on the basis of a diversion at Chicago of 8500 second feet that the Chicago Drainage District should contribute $1,750,000.00 to the cost of the compensating works, as contemplated in the permit granted by the Secretary of War. It further states that while the amount of the Chicago diversion may be changed before the compensating works are constructed, the cost of such works to the United States would not be materially affected."

The recommendation of the Chief of Engineers as shown by this letter is for the construction of compensation works as described, and this was, as shown by the quotation from the statute above, the project adopted.

We direct the attention of the court also to the provision contained in the same statute last above quoted, providing for an improvement to a 24 foot navigable depth. The original report of the former Special Master stated (pp. 113, 114) that vessels on the Great Lakes are designed to navigate to 24 feet.

That Master's report places the great damage from the diversion, and its resulting lowering of levels, almost exclusively upon its interference with the capacity of the large ore-carrying vessels on the Great Lakes. As a result of the project above provided by Congress in the Act of 1930 the depth is increased from the previous limiting depth of from 19 to 21 feet to 24 feet, thus almost entirely minimizing the navigation damage from the diversion.

Aside from that, however, the requirement of compensating works restores the levels. If it be possible to restore the levels with a diversion of 8,500 second feet as is contemplated and recommended by the Chief of Engineers, can there be any question about the fact that in relating the amount of diversion down the Illinois waterway for the navigation benefits thereby to be derived on that waterway to the maintenance of lake levels on the Great Lakes the War Department is given a wide discretion? *Within the requirements as set forth in the Illinois River item above, that the diversion be the least possible without harmful effect upon lake levels; there is in fact a wide range.*

The Special Master has entirely overlooked the effect of these other two provisions of the same statute which must be read in conjunction with the Illinois River item. If the levels are to be restored, and this restoration contemplates a diversion of 8,500 second feet, as is shown by Gen. Jadwin's letter, clearly the War Department without any harmful effects to the levels of the lakes,

after the restoration, could recommend for the benefit of Illinois River navigation a diversion up to that amount.

This restoration of levels, it must be understood, clearly restores all the "just rights" of the complainant states. When this is accomplished the purpose of the decree herein is achieved. But this statute, with due regard to the complainant's rights, indicates the interest of Congress to use to a reasonable extent, later to be determined, Lake Michigan water to benefit navigation on the waterway to the south. We here point out the wide discretion the facts necessarily allow for this future determination, while still allowing for the maintenance of lake levels.

These necessarily are complicated engineering questions, and with entire propriety left to the discretion of the War Department. The Special Master must, we assume, have misunderstood their relation and effect upon the controversy here involved.

But, as a result of this statute, we insist in the first place that the ultimate determination of the amount of diversion for navigation on the waterway is reserved. That fact is to be determined by the Chief of Engineers after operations have begun on a completed channel. Within the power vested in the Secretary of War to act upon the recommendation of the Chief of Engineers under Section 10 of the Act of 1899, as clearly and definitely interpreted and asserted by this court in this case, upon the coming in of the report of the Chief of Engineers called for by this statute, the Secretary of War on such recommendation could approve the diversion so determined. We submit this conclusion cannot be escaped.

The decree of this court is based, as stated above,

solely upon the navigation requirements of the Chicago harbor and without contemplation of the actual restoration in fact of lake levels, and limits the diversion in 1938 to 1,500 second feet. We have no means of knowing now what the determination of the Chief of Engineers in the required report will be. But if his recommendation calls for a diversion in excess of 1,500 second feet, clearly the decree of this court is a bar to giving effect to what the court has already held in this case is and would be a lawful exercise of authority by the War Department. We, therefore, respectfully suggest that this court should modify its decree so that it in no way interfere with the future full and free exercise of the discretion lawfully imposed upon the War Department.

There is apparent in the Special Master's discussion of this statute, as well as in his comments upon the controlling works issue, a strong suggestion to this court that it should now express its own opinion concerning these complicated engineering questions. We respectfully urge that such suggestions are improper, and should be entirely disregarded by the court. The power of the Secretary of War upon recommendation of the Chief of Engineers has been settled, not only in this proceeding but in numerous other cases. It is a power to determine, upon experience and expert capacity, questions of fact as to the reasonableness or not of contemplated constructions in navigable channels or alterations thereof. This court surely will not attempt to influence in advance determinations which, under the express mandate of Congress, are to be made within this authority by the Chief of Engineers and submitted to the Secretary of War for his action.

B.

BY THE ACT OF CONGRESS OF 1930 AND ALSO CONTEMPLATED UNDER THE PENDING TREATY WITH CANADA CONCERNING THE ST. LAWRENCE SEAWAY PROVISION IS MADE FOR COMPENSATION WORKS TO RESTORE THE LEVELS OF THE GREAT LAKES. THIS RESULT UNDER BOTH THE STATUTE AND THE TREATY WILL OCCUR AT A DATE SOONER THAN IF THE ORIGINAL DECREE HEREIN WERE CARRIED OUT. WE INSIST THAT IF THE LEVELS ARE TO BE RESTORED AT A TIME SOONER THAN PERFORMANCE OF THE ORIGINAL DECREE WOULD PRODUCE, THERE IS IN FACT NO EMERGENCY PRESENT CALLING FOR THE EXERCISE BY THIS COURT OF ANY ADDITIONAL OR EXTRAORDINARY REMEDY TO ASSIST THE COMPLAINING STATES TO THEIR RELIEF.

We have referred above to the provisions of the Act of 1930 providing for the restoration of the levels of the Great Lakes by compensating works and have pointed to the specific item in the statute designed to produce this result.

There was introduced in evidence before the Special Master, (*and his attention was directed to them on oral argument and in brief*) the sections of House Document No. 253 referred to in the Great Lakes item above quoted dealing with compensating works, the numbers of which are set forth in the item. These state (Sec. 68):

> "It is estimated that the contraction furnished by the structures will raise the low levels of Lake Erie by 0.7 foot and the high levels by a slightly less amount."

Section 70, likewise in evidence, says in part:

> "The approximate locations of the sills which were computed as necessary to effect a rise of 1 foot in the levels of Lakes Michigan and Huron, the backwater effect of the Niagara works considered, are shown on drawing No. 3."

Section 71 recommends that in order to avoid any bad effects on the St. Lawrence River the construction works should be spread over about four years and suspended during extreme low water periods.

There is pending before the Senate of the United States with the recommendation by the Foreign Relations Committee that it be adopted, what is known as the Great Lakes St. Lawrence Deep Waterway Treaty between the United States and Canada. Under Paragraph (e) of Article VIII thereof the following provision for compensation works is made:

> "(e) that compensation works in the Niagara and St. Clair Rivers, designed to restore and maintain the lake levels to their natural range, shall be undertaken at the cost of the United States as regards compensation for the diversion through the Chicago Drainage Canal, and at the cost of Canada as regards the diversion for power purposes, other than power used in the operation of the Welland Canals; the compensation works shall be subject to adjustment and alteration from time to time as may be necessary, and as may be mutually agreed upon by the Governments, to meet any changes effected in accordance with the provisions of this Article in the water supply of the Great Lakes System above the said works, and the cost of such adjustment and alteration shall be borne by the Party effecting such change in water supply."

Upon the adoption of this treaty the appropriation made for the projects authorized in the Rivers and Harbors Bill of 1930, including compensation works, by the War Department Appropriation Bill of 1931, becomes immediately available for carrying out this treaty requirement. So far as this litigation is concerned, this court must assume that the proper officers of the Government, charged with official duty in the premises, will act, and either under the treaty or under the Act of 1930 will go forward and perform those things necessary to

restore the levels of the lakes to a point higher than before they were reduced by the effect of the maximum diversion at Chicago.

These matters were pointed out on oral argument to the Special Master, but his tentative report had been prepared before he heard the oral argument, and quite obviously their effect had theretofore escaped his consideration.

We now insist the provision for the restoration of the lake levels is of the utmost importance in its relation to the present issue before the court.

Under the original opinion the complaining states are held entitled to the restoration of their just rights—the restoration of lake levels to result through the forces of nature from a cessation of the diversion. Cutting down or stopping the diversion is, therefore, no more than the means or instrumentality selected by this Court to restore the complainant's "just rights." This court, however, under times such as these and circumstances to be hereafter noted, will not do a useless thing. It may, with propriety, affirm its original injunction against further wrongful acts by the defendant Sanitary District. It may also enjoin any act by the State of Illinois, if such act be designed to assist the District in any wrongful action by it, and from doing anything which will repeat what the court has held in this litigation to have resulted in a wrong to the complaining states. **But if those states are about to receive, by act of Congress lawfully adopted under its paramount power to regulate commerce and control navigation or by the treaty, all of the benefit which the complaining states were seeking in this litigation, what emergency now confronts the court, even though the defendants, through causes beyond their control, have**

stopped doing those things for their own protection which will permit them safely to adjust themselves to the decree? Is there any emergency whatever to justify any extraordinary procedure?

The record shows clearly, and the Special Master so found, that the Sanitary District has stopped going forward with its construction program solely through lack of funds and as a result of causes beyond its control. The same is true as to the State of Illinois to any extent (even under the Master's theory), for which the state may be held responsible herein. There is, therefore, only an emergency for the protection of the citizens of Cook County. There are 4,000,000 people whose lives and health will be endangered, as this court has found, if the diversion be reduced below the danger point, as a result of the court's decree, in the absence of the completion of this program of artificial protection. But this emergency is not an emergency jeopardizing, for the reasons above pointed out, the receiving of the desired remedy by the complaining states. The lake levels will be restored in another way. Under these circumstances, instead of this record calling upon this court to grant extraordinary remedies of the utmost harshness in view of economic conditions and for the exercise of a power never heretofore seriously contemplated, the record demands a modification of the decree by postponement of the several dates for reducing diversion until the economic depression has abated, tax collections in Cook County have become normal and funds are available for the completion of the protective program.

II.

THE RECOMMENDATIONS OF THE SPECIAL MASTER HEREIN FOR THE SUGGESTED EXTRAORDINARY REMEDIES UNDER PRESENT CONDITIONS ARE UNREASONABLE AND IMPRACTICAL. THEY COMPLETELY FAIL TO MEET THE REQUIREMENT OF THE COURT THAT HE SHOULD NOW SUGGEST FINANCIAL MEASURES ON THE PART OF THE SANITARY DISTRICT OR THE STATE OF ILLINOIS WHICH ARE REASONABLE. JUSTIFIABLE ONLY THROUGH WHAT THE SPECIAL MASTER DEEMED WAS A COMPELLING NECESSITY TO MEET AN EMERGENCY CALLING FOR SPEED, IN FACT THEY WOULD PRODUCE GREATER DELAY THAN IF NO FURTHER ORDER WERE ENTERED.

We shall only briefly discuss under this heading a few of the practical considerations which occur, and these comments are submitted on the assumption that the court deems it within its power to adopt the extraordinary procedure of first seeking to control the legislative discretion of the General Assembly of Illinois by its mandate and then in controlling such discretion to force the General Assembly of Illinois to disregard the Constitution of Illinois. We do not however admit this court's power can be carried so far.

As shown by the Master's Report, the General Assembly of Illinois is required by the State Constitution to adjourn on or before the first of July next, and customarily it adjourns about the middle of June in order to allow the Governor sufficient time to exercise his constitutional function of approving or disproving statutes adopted by the Legislature. Quite clearly, in view of the effects of the depression upon the financial condition of the State, the constant necessity for unemployment relief, and other matters suggested in the Master's Report, there is no likelihood of an

adjournment by the General Assembly of Illinois this year until after this court will have concluded its sessions for the present term. The court, therefore, can not have its attention directed to any failure to comply with the suggested mandate recommended by the Special Master until it reconvenes in next October.

We assume that if at the beginning of the next October term the court's attention were directed to a failure on the part of the General Assembly of Illinois to comply with its mandate, the precedents heretofore followed in litigation of this kind will still prevail. The State of Illinois and its responsible officials will be allowed an opportunity to present relevant contentions before the Court. The usual and fair method of this legal procedure, which this court so strikingly demonstrated in the long drawn out controversy between Virginia and West Virginia, we assume will still prevail and further legal delays will therefore follow. The court will then finally confront the serious problem as to how its mandate may be enforced.

We assume the court will not read from this discussion any lack of respect upon the part of the State of Illinois to the dignity of this court, nor any suggestion of disloyalty by the State to the fundamental obligations of the Constitution of the United States. We find it very difficult to suggest to the court with sufficient emphasis and gravity a proper understanding of the facts, the practical difficulties which will confront the General Assembly and the Governor of Illinois, if the recommendations of the Special Master should be adopted. From the beginning Illinois has followed the procedure usual in this country of organizing government by leaving to local municipalities a wide discretion. Our State Constitution requires that the taxing power which may be delegated by the Legislature to local municipalities, must

be given to corporate authorities and the Supreme Court of Illinois in interpreting this requirement has held that such corporate authorities must be elected by the people. (See *Wetherell* v. *Devine,* 116 Ill. 631, 635, 638.) Our Constitution in effect embodies to a marked degree the right and obligation of local self-determination or, as it is called in the politics of Illinois, the principle of home rule.

In furtherance of the most praiseworthy object of preserving the health of citizens in Cook County and to afford a means of meeting an acute and dangerous situation, in 1889 the Legislature of Illinois authorized by general statute the formation of a sanitary district and as a result the people of the Sanitary District of Chicago availed themselves of this privilege and by lawful election created the Sanitary District. This creation, therefore, was only in part the act of the State. This again illustrates the nature of the process of the erection of governmental structure determined by the people of Illinois for themselves by their Constitution and laws. From the beginning the Sanitary District has been locally autonomous except, and this the Special Master entirely failed to note, the Legislature eventually modified the original act by imposing upon the Sanitary District the legal obligation to create plants for the artificial treatment of sewage in substitution of the original program of diversion and did this at a date preceding the beginning of these cases.

State governments and institutions necessarily reflect the social and economic situation of the people in the State. Illinois has within Cook County more than 50 per cent of the people and a still greater percentage of the taxable wealth of the State. Inevitably the interests of the balance of the State and of Cook County do not always seem to their respective representatives in the

General Assembly identical. Whether such conflicts as have arisen in point of view be selfish or appropriate need not be considered, but this difference in attitude has served to keep alive and enforce to a marked degree the principle of local autonomy above referred to. It is not in Illinois a mere theoretical political doctrine, but is an ever present principle which comes into play and has an effect upon almost every proposition of state-wide importance.

This principle, as stated, has entirely controlled the growth, creation and conduct of the Sanitary District. *The recommendation of the Special Master is in effect that this court by mandatory injunction set aside this controlling constitutional principle and direct the General Assembly of Illinois completely to disregard it.*

In times such as the present the burden of local taxation is almost unbearable. Where in fact it has proved unbearable to such an extent in Cook County as to be the sole cause for this pending proceeding, it is peculiarly the obligation of each member of the General Assembly, an obligation reflected in constant and repeated demands of his constituents, to minimize and avoid any increase of tax burden. The mandate suggested by the Special Master in directing an issue of bonds by the State of Illinois would require the members of the General Assembly of Illinois from districts outside of Cook County to voluntarily assume, by their vote for the suggested statutes, the assumption of an additional tax burden. The Special Master suggests the possibility of postponement of the payment of these taxes and erroneously says (McClennan Report, p. 115):

> "The principal of the $35,000,000 need not affect the tax rate for some years to come if the General Assembly decide against early maturities."

This entirely overlooks the annual interest requirements which must be made from taxation, even if early maturities of principal be avoided.

These observations suggest only a few of the difficulties which the proposed mandate if entered by this court would impose upon members of the Illinois General Assembly.

By Article III of the Illinois Constitution, the powers of the government of the State are divided into three distinct departments—the legislative, executive and judicial—and it is specifically provided that no person or collection of persons being one of these departments may exercise any power properly belonging to either of the others, except as expressly directed or permitted by the Constitution.

Even if the present counsel for the State of Illinois possessed a definite and decided opinion as to how the General Assembly of Illinois would deal with the proposed mandate, clearly, under this constitutional provision, it does not lie within our authority to speak for the Legislature in advance of its consideration of this problem. We can only suggest here a few of the difficulties involved. We submit, however, that whether the possibility be remote or be a very practical and pressing consideration, this court in deciding upon whether it will adopt the unheard of recommendations of Special Master McClennen should, with propriety, seriously contemplate the possibility that the General Assembly of Illinois will not obey the mandate of this court.

There is also necessarily presented by the mandate recommended by the Special Master, the function of the Governor of Illinois in this connection. Section 16, Article V of the Constitution of the State of Illinois provides in part as follows:

"Every bill passed by the General Assembly shall,

> before it becomes a law, be presented to the Governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If then two-thirds of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law, notwithstanding the objections of the Governor; but in all such cases the vote of each house shall be determined by yeas and nays, to be entered upon the journal * * *
>
> Any bill which shall not be returned by the Governor within 10 days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner, as if he shall have signed it, unless the General Assembly shall, by their adjournment, prevent its return, in which case it shall be filed with the objections in the Office of the Secretary of State, within 10 days after such adjournment, or become a law."

The Governor of Illinois, therefore, in this particular, as required by the Constitution, must exercise an essential part of the function of the enactment of statutes in determining whether or not to utilize his right and responsibility to veto bills he does not approve.

The mandate recommended by Special Master McClennen involves, therefore, the requirement that the proposed legislation when and if adopted by the General Assembly be submitted to the Governor after his approval. If he should disapprove, a two-thirds vote of the Legislature by yeas and nays recorded in the journal is required.

In effect, therefore, the proposed mandate would seek to control the legislative discretion of the General Assembly of Illinois and the legislative discretion of the

Governor of Illinois. Here again counsel for the State may not with propriety express any opinion as to the action the Governor may take under these possible circumstances. But even if the Legislature should deem it necessary to override every controlling political and constitutional principle which has for a century guided legislative action in the State, and to overlook self-interest, as well as the definite requirements of their constituents, the Governor still must meet his constitutional responsibility.

There was introduced in evidence before Special Master McClennen a few of the details in connection with the problem of unemployment relief in the State of Illinois. There is in evidence, before the court, reports of the State Commission dealing with this problem under state statute, and it is there stated that there are in Illinois, as shown by those reports, a total of 146,000 families dependent upon public funds for the bare necessities of life. As testified, for relief purposes a family is taken as constituting approximately 4⅓ persons. These people are entirely dependent upon public funds for the bare necessities of existence. With tax collections delinquent in Cook County, the source of more than 50 per cent of the tax revenue of the State, with estimated requirements to care for these people, as testified, exceeding eighty million dollars for the year 1933, the gravity of the problem, by these bare figures, stands revealed.

We print as an appendix to this brief in full the testimony of Governor Horner given in this proceeding. He said in dealing with this phase of the existing difficulties in Illinois:

> "Another great problem which confronts the State of Illinois at the present time is the unemployment relief. We are doing our utmost in this respect, but our financial capacity under existing conditions to meet bare necessities of human needs, seems utterly

insufficient. So far, we have been able to do so by the help of the federal government. The nature of this problem, the constant appeal which must be made to the legislature in this connection, makes it one which every person in official responsibility knows. Without regard to any other consideration, in my opinion, it must come first.

Approximately 800,000 persons throughout our state, by reason of widespread unemployment, have become entirely dependent upon private and public relief, and, of course, have enlisted the sympathetic interest and concern of both state and federal governments. At first, our efforts in Illinois were made to give aid through private subscriptions and agencies, and through local public charities. When those resources were exhausted, and they were shortly, every possible method was devised to meet the almost ghastly situation. Through the Illinois Emergency Relief Commission, with the aid of the Reconstruction Finance Corporation, public funds have been used to an almost fabulous extent. More than thirty odd million dollars have been furnished alone by the Reconstruction Finance Corporation.

Our relief representatives are now in Washington, seeking some six and one-half millions, or thereabouts, which, as I understand it, is the last moneys Illinois will be entitled to receive under the provisions of the present Reconstruction Finance Corporation fund. * * *

It is not difficult to imagine the possibility of bread riots, and like difficulties, in the large centers of this state, where relief is not available and unemployment still continues. * * *

With these difficulties facing the state entirely on the problem which deals so intensely with human sympathies, you can well imagine the insurmountable difficulties our state would have in carrying an additional burden resulting from asking the entire state to bear the cost of an obligation which the Supreme Court has fixed upon a limited locality in the state, such as the Sanitary District.

Of course, we cannot permit our fellow-citizens to starve, nor to deny them shelter, clothing and the mere sustenance of life. And, mind you, they are

not those that are usually dependent upon charity; they represent hundreds of thousands of fine men and women, who are well and anxious to work, but who are so situated because of general unemployment. Notwithstanding what the record in this case may have implied, I cannot believe that the sister states of Illinois are willing to destroy entirely the hope of our state in our effort to extricate ourselves from our present catastrophe. * * *'' (Tr., 1977-1980.)

(NOTE: The numbers of those requiring relief given by Gov. Horner are actual, but as of a much later date than the reports above referred to.)

The sales tax referred to by the Governor has with difficulty, been passed and unless prevented from collection by pending litigation, it is anticipated that it will produce approximately fifty million dollars of revenue. By the statute the entire receipts of the tax are to be devoted to unemployment relief.

If $35,000,000 of bonds are to be voted under the mandate of this court by the General Assembly, and such legislative enactment approved by the Governor, the financial capacity of the State to meet these pressing and not to be exaggerated humanitarian necessities is limited to that extent. Under existing conditions it cannot be disputed that there is a very definite and fixed limit to that capacity. We shall discuss this further as it is our contention that under existing circumstances the state's credit is insufficient to make salable these bonds, even if they be authorized. But what we here stress is the nature of the choice which the facts of the matter would impose upon the members of the General Assembly and the Governor if the Master's recommendations be adopted. Humanitarian considerations, the necessity of caring for our own people must be given first consideration. This compelling necessity may well, if that be the choice, even come ahead of measures designed to prevent

epidemics, disease and death. Even though the analysis made by the Special Master, who has ventured to assert that the Governor of Illinois, informed as he is, takes "too gloomy" a view of the situation, be correct, reaching a contrary conclusion cannot be a basis for criticism. Let the court assume for a minute that the members of the General Assembly and the Governor should honestly believe, if they should approve the bonds recommended, that they would in truth and in fact divert funds which otherwise would be unavailable for the care of persons, citizens of the State of Illinois, otherwise without relief. Such a conclusion is far from unlikely as demonstrated by the testimony in this record. We need say no more, we submit, to press upon the court's attention the practical necessity of now giving consideration to at least the possibility, if no more, that the responsible officers of the government of Illinois cannot meet the obligation the Special Master asks this Court to impose upon them.

We, therefore, ask the Court to assume for the sake of analyzing the situation that its mandate will not be followed. The Court must then adopt some procedure of enforcement. The Special Master himself rejected a suggestion of the complainant states that an officer of the Court be appointed for the purpose of carrying out the decree. He said (McClennen Report, p. 37):

> "The complainants urge that the Court should appoint a special officer of this Court to perform the decree on behalf of the State of Illinois and of the Sanitary District and at their expense, with extensive powers to contract, and to issue bonds of both and to levy and to collect taxes. The steps so urged are so inexpedient if not futile that they should not be taken, even if this Court has the power. This makes it unnecessary to decide whether the Court has this power. If I am in error, and the Court deems it should take the steps urged, a memorandum on the subject of power is included hereinafter for the convenience of the Court.

There is no reason to think that if the State of Illinois is ordered to do this work, any more will be necessary, or that a commissioner would be any more effective than an order of this Court.

The construction of the Controlling Works should be begun this year, if authorization can be obtained. For reasons given hereinafter, neither the State nor the Sanitary District now has available money for this purpose this year. A commissioner exercising all the powers of the General Assembly of Illinois and all the powers of the Sanitary District under the existing constitution and legislation cannot raise money this year for this particular purpose, until this Court has by its decree imposed a duty upon the State of Illinois to do this work. If the commissioner is to exercise direct powers of this Court superior to those of the Sanitary District and of the General Assembly to levy and to collect taxes and to issue bonds the necessary machinery cannot be set up in time. The commissioner would be received in Illinois as a carpet-bagger. He would need an army of subordinates to make the valuations, the assessments, and the collection of taxes from a reluctant people. His bonds would not find a ready market in Illinois and would be viewed with hesitation as a novelty elsewhere. He should not be vested with Governmental discretion by the Court for such a huge Governmental project. It would be a serious task for the Court to draft a code of laws to govern his operations. He would have to build up an engineering staff and to exercise a judgment as to what particular kinds of structures should be built and what methods should be used for their construction. These and many more considerations of impracticability condemn the method."

These comments are pertinent observations upon the practical nature of the problem this court would confront in attempting to enforce this suggested decree.

Aside from the obvious difficulties so suggested, there are social and individual phases of the problem which, although suggested in argument to the Special Master, have not, we submit, received sufficient consideration.

The country at large and the State of Illinois peculiarly is suffering the effects of the depression. The minds of citizens are easily affected by any abnormal disturbance of the conditions we have become accustomed to in our daily life. We venture to suggest that grave consequences would follow any attempt by the Supreme Court through any agency whatsoever to take over the exercise of governmental authority in the State of Illinois for the purpose of carrying out this proposed decree.

These comments only suggest a few of the possible evils which might result from the adoption of Special Master McClennen's recommendations. The gravity of these possibilities should, we submit, be contrasted with the purpose to be achieved by these doubtful, harsh and impracticable remedies. We have not a situation where the State of Illinois is called upon to raise funds which can be utilized by other states for their benefit and from which use the State of Illinois or the Sanitary District has been wrongfully depriving such states. The decree herein in its essence enjoined the continuance of acts by a local municipality of Illinois, which resulted in injury to the complaining states by reducing the levels of the Great Lakes. The Court did not direct an immediate injunction, but postponed the performance of its injunction for one purpose only,—to prevent the evil results to the health and lives of 4,000,000 people, which the Court itself found would follow from an immediate shutting off of the diversion. The Court postponed performance in order to give the people affected an opportunity through expenditure of money in the creation of sewage disposal plants to protect themselves. The entire purpose of the Special Master's recommendations, therefore, is solely to force the people of Cook County or their fellow-citizens in Illinois to do certain things in order to accommodate for themselves the

Court's original requirements as to the date diversion should be stopped. The sole benefit to the complainant states is to be the ultimate restoration of lake levels following the cessation of diversion. We ask the Court to contrast the evils pointed out above with the ultimate benefit to the complainants—the addition of four inches of water on top of the vast surfaces of the Great Lakes. This result and this alone is the only result the complainant states are entitled to receive in this case.

When, as we have shown above, the remedy the complainants seek—the addition of this four inches of water—is to be provided for them by other agencies, the contrast between the relatively slight benefit to result from this remedy and the dangerous and, we submit, inequitable consequences to follow the proposed means to achieve this remedy becomes sharper. This contrast demonstrates that the Special Master's recommendations are unreasonable.

EVIDENCE IN THE RECORD DEMONSTRATES THAT DUE TO THE EFFECTS OF THE BUSINESS DEPRESSION THE STATE OF ILLINOIS DOES NOT POSSESS AT THE PRESENT TIME SUFFICIENTLY ASSURED FINANCIAL CAPACITY TO JUSTIFY THE ADOPTION OF THE SPECIAL MASTER'S RECOMMENDATIONS.

After an opportunity to examine the recommendations contained in the tentative report which, it should be mentioned, are those now before the Court, counsel for the State of Illinois sought and obtained an opportunity to present the facts as to the existing financial condition of the State. Although relevant to the inquiry before, this evidence had not been presented because of its obvious embarrassment to important and delicate problems then demanding attention. There was offered the testimony of Director of Finance Rice, an officer of the State at the head of the Financial Department of the State, and

also the testimony of Gov. Henry Horner, which we print in full as an appendix hereto and respectfully urge the Court to consider and weigh most carefully.

The Director of Finance testified as did the Governor that immediately upon the Governer's taking office early in January, he directed an inquiry in the nature of a survey as close, however, in manner, form and thoroughness as possible to an audit, designed to reveal the financial status of Illinois.

The Special Master comments at pages 114 to 121 of his report upon this evidence. Many of his comments seem to us unjustified. The statement, for instance, that the bonds of the State have a high standing and are readily marketable, is clearly not justified by the present condition of the State. From this it appears that the State began the year 1933 with a cash deficit of slightly exceeding $8,000,000. It was testified by the Director of Finance that allowing for economies already affected of over $3,000,000, and estimating revenues upon what was definitely testified to be a somewhat optimistic basis, the State would have a cash deficit at the end of the year exceeding $15,000,000. The deficit in cash arose very largely from the inability to collect taxes in Cook County. These tax delinquencies had already necessitated inter-fund borrowings through the process of selling to funds tax anticipation warrants. The margin, as shown by the survey of the Director of Finance, based on the estimated revenue and necessities for expenditures as outlined, was the dangerously small amount of $3,707,000. The deficit of over $15,000,000 would have to be made by inter-fund borrowings. It is necessary to suggest that this process may be subject to interruption or entirely prevented by litigation. It is equally apparent that tax collections may not come in the amount estimated and recent figures of collections in Cook County indicate

grave doubt as to the basis taken in preparing these figures.

Since bonds can only be issued as the result of a popular vote at a general election, and since under the law of Illinois the next General Election does not occur until November, 1934, the only means by which the State can finance itself, except by some new process of taxation, is the sale of tax anticipation warrants. These warrants are mere promises to pay out of tax collections when, as and if received. Interest is paid upon them but only at the time of payment of principal. These warrants are not held to be debts. They may be sold, however, if the credit of the State is good, and, to an even greater extent than bonds, their salability depends upon the way in which the bond market regards tax collections as reasonably certain within a reasonable period. Recent experiences in Illinois as set forth in the Master's Report indicate grave doubt as to whether the State could sell such warrants and certainly it could not sell them in any large amount.

The Master's approach to this situation is well illustrated by the following paragraph (p. 119 of his report):

> "If the cost of construction of the Controlling Works and of the Sewage Treatment Works, were to be met from the annual levies of the next four years, it would present the question whether the expenditures for other purposes must be cut or whether the levies must be increased or whether the State must take effective steps to overcome sluggish tax collecting in Cook County. It might then be necessary to weigh Road Improvements $29,745,000 against performance of duty by Sanitary Improvements $35,000,000. On the other hand, if this cost is to be met over twenty or more years in the payment of bonds issued now from time to time, for the money borrowed for this purpose, the current expected disbursements and receipts are less important."

When taxpayers have not funds available for tax collection and as a result their properties are sold or they have defaulted upon mortgages upon their homes, it is difficult to understand what further "effective steps" can be taken by the State "to overcome sluggish tax collecting in Cook County." When, as is such a matter of public information that this court can take judicial notice of it, the school teachers of Cook County have not been paid for many months, when firemen and policemen have their wages and salaries in arrears, when the bonds of the Sanitary District are in default and the bonds of Cook County are in default and the City of Chicago can not sell any more bonds, a situation of the utmost gravity is presented. The Court will remember that more than 50 per cent of the taxable property, consequently more than 50 per cent of the general property tax, is located in and collected from Cook County. The direct effect upon the revenues and financial condition of the State is apparent.

The Special Master in the above statement suggests that road improvements, an item of $29,745,000, should be weighed against his recommendation of an additional expenditure by the State of $35,000,000. It was specifically testified by the Director of Finance that actual improvements were contemplated in a much less amount than $29,000,000, in the total of which administration, maintenance, highway police, expense of collecting taxes and many other items were also included. It is also pertinent to observe that it was testified by the Director of Finance that contracts had been let prior to the beginning of the year in such a way as to be valid obligations of the State, calling for the use of most of the revenue in this item. There would be little, if any, available for any Sanitary District construction within the year 1933, even if the Legislature of the State should desire to go counter to what is now required by law to be expended for this purpose.

The Governor of the State testified:

> "I have no hesitancy in saying that, unless conditions rapidly and marvelously change for the better, the capacity of our State to find a market during each of the next four years for thirty-five millions of bonds, if such an unusual thing were required by the Court, is an impossibility. This would be so even without the other present and future financial necessities of the State."

The Director of Finance expressed the same opinion. This Court, therefore, is given the choice between the conclusion of the Special Master and the testimony given under oath of the two men, the responsible officials, whose character and capacity cannot be challenged. On the one hand is the Special Master of this Court, who, in a summary way, as directed by this Court, conducted this investigation. He was without knowledge of conditions in Illinois as is shown by many of his misconceptions as to the law of the State, upon which there is not in this brief adequate opportunity to comment. The problem presented involves intangibles which can only be properly appraised by long experience and close familiarity. These, the witnesses in question possess. The Special Master did not. There was no testimony whatever controverting their conclusions. We respectfully submit the Special Master's opinion on this point cannot be accepted.

It surely must be admitted whatever view may be taken of this issue of fact, an issue, however, not presented by conflict of testimony, that there is doubt and will continue to be doubt as to the financial capacity of the State of Illinois to carry out the program of money-raising recommended by the Special Master. If the depression rapidly diminishes, this program might be carried out. If it long continues or becomes worse, it clearly cannot be carried out. This, we confidently assert.

We respectfully suggest that this doubt—what we believe is no doubt but a certainty—as to the incapacity of the State to issue and market bonds in the required amounts, is a most important factor to which this Court must give serious consideration.

As we have pointed out above, the estimated requirements for unemployment relief for the year 1933 in the State of Illinois, an official and considered estimated amount which is not challenged in the slightest by any evidence in this record, is the staggering total of $80,000,000.00. We have further shown, and here again the testimony is unchallenged, that the revenue to be derived from the recently adopted sales tax, all of which is to be devoted to relief, is $50,000,000.00. The State of Illinois, therefore, has been unable so far to provide by the amount of $30,000,000.00 the estimated requirements for unemployment relief. These are the facts, undisputed, shown by this record. Is this Court to assume that the State has easily available resources which can be devoted, through the sale of bonds, to unemployment relief, which have not been exhausted in the face of these compelling necessities? The conclusion of the Special Master that bonds in the sum of $35,000,000.00 could be readily sold by the State is clearly contradicted by these facts.

III.

THIS LITIGATION HAS HERETOFORE PROCEEDED WITH A COMPLETE ACQUIESCENCE BY THE COURT AND OPPOSING COUNSEL IN THE FACT THAT THE SANITARY DISTRICT IS THE RESPONSIBLE DEFENDANT AND PROPERLY CHARGEABLE WITH PERFORMANCE OF THE REQUIREMENTS, DIRECT OR IMPLIED, OF THE DECREE HEREIN. NO ISSUE HAS HERETOFORE BEEN PRESSED OR ADEQUATELY DECIDED INVOLVING A COMPLETE DETERMINATION OF THE LEGAL LIABILITY OF THE STATE OF ILLINOIS. THE SPECIAL MASTER'S RECOMMENDATIONS ARE BASED UPON AN ASSUMPTION AS TO THE DECISION OF SUCH ISSUE AND ARE, THEREFORE, PREMATURE.

We assume it will be unnecessary to cite to the court the now numerous decisions in which the court has exercized its extraordinary jurisdiction to settle controversies between states. In all of those cases, we respectfully suggest, the utmost deference is shown to the rights of the sovereign states defendants therein. In none of them is there any summary disposition of the determination of the liability, its nature and extent, of the defendant state.

In these cases the State of Illinois is made a defendant to bills in equity seeking an injunction to stop acts claimed to result in a nuisance. Since the active defendant—The Sanitary District of Chicago—is a municipal corporation of the State and in some ways subject to the control of the General Assembly of Illinois, with propriety the State was made defendant in order that the injunction sought should afford complete protection, if granted, against acts resulting in nuisance whether performed by the Sanitary District, the actual defendant, or by any other person or agency within the territory of the limits of the State.

The State of Illinois has not heretofore sought to object to its having been joined with the Sanitary District as defendant *for this purpose.* It does not now so object.

The Special Master's recommendations, however, submitted by him in response to the question of the Court as to what are the reasonable financial measures necessary in order to carry out the decree of the Court to be undertaken on the part of the Sanitary District or the State of Illinois seem to us, with the utmost deference, to involve the consideration of an issue not heretofore made or presented, nor heretofore considered.

In view of the nature of the Court's question, as is apparent throughout his report, the Special Master has assumed this issue has been decided—the issue as to the exact nature and extent of financial and legal liability of the State of Illinois as separate and distinct from the liability of the Sanitary District. For instance at page 44 of his report, Special Master McClennen says:

> "The record ending in the final decree of April 21, 1930, shows that the wrong was done and is being done by the State. This has become *res adjudicata.* The postponement of the remedy did not make the continued diversion less of a wrong."

And, in support, the Special Master quotes a number of expressions from the Court's opinions in this case and from the different Master's reports. But whatever the language used, these expressions were realistic in their approach to the question presented. The entire case has been heretofore presented and discussed with a complete recognition of and acquiescence in the existing structure of government in Illinois. Under this the Sanitary District is a separate municipal corporation empowered, it is true, in part by act of the Legislature, but, and this should not be overlooked, essentially empowered by the vote of the people of the District. This cor-

poration has possessed ample financial capacity in the right to levy taxes and issue bonds, to enable it, as previously expressly found by the Special Master on re-reference, to accomplish those measures of self-protection needed to adjust the injunction allowed against the acts creating nuisance to proper protection of the health and lives of the people of the District. *Whatever language has been used, we insist that no particular consideration, no determination as of a separate and distinct issue, has been made in this proceeding up to this point as to the exact nature of the legal liability of the State of Illinois for the acts of the Sanitary District.*

Special Master McClennen may have been justified in regarding this issue as previously decided, in view of the nature of the Court's direction to him. Whatever the fact be, however, we point to the rights of sovereign states as asserted by this Court in numerous proceedings and suggest that any such conclusion is premature until this issue has been given the separate, distinct and careful consideration a sovereign state is entitled to ask at the hands of this Court.

This is not a mere technical assertion made for purposes of delay, but one of fundamental right.

In order that the Court may see that there are factors bearing upon this issue which have not received adequate consideration, we shall briefly analyze the history of the state's actions in the premises and discuss the nature of its constitutional limitations. We will show that what Illinois did in bringing into existence the Sanitary District and giving it the powers embodied in the Act of 1899 was fully within the then existing lawful authority and power of the State of Illinois; that Congress, by the exercise of paramount authority, later adopted regulations affecting the acts of the Sanitary District and no

further action was thereby rendered necessary by the State of Illinois to control such acts of the District as have been found by this Court to have produced an actionable nuisance. We will further show that the nature of the decision herein when analyzed demonstrates the rights of the State of Illinois have not been adjudicated.

A.

IN AUTHORIZING THE CREATION OF THE SANITARY DISTRICT OF CHICAGO IN 1889 THE STATE OF ILLINOIS PROCEEDED COMPLETELY WTHIN THE LIMITS OF ITS LAWFUL ANTHORITY, NOT ONLY AS CONCERNS DOMESTIC MATTERS BUT TO THE EXTENT THIS ACTION INVOLVED INTERSTATE COMMERCE OR AFFECTED THE RIGHTS OF THE COMPLAINANT STATES HEREIN.

As found by the Special Master in his first report in these cases, the Sanitary District was created under an act of Illinois authorizing the creation of the type of district therein provided for by vote of the people within the proposed district, primarily for the purpose of solving the sewage problem in the City of Chicago, but secondarily for the purpose of creating an artificial navigable channel, the water in which should be derived by diversion from Lake Michgan. No one, so far as any of the findings in the two reports of the Special Master in this case or the opinions of the court show, had ever suggested or foreseen that the diversion of water from Lake Michigan, in the amount contemplated by the permissive act of the State Legislature of Illinois, could have such an effect upon the lake levels as would either interfere with interstate commerce or produce injury to neighboring states. At that time Congress had not exercised its power under the commerce clause of the Con-

stitution to regulate by any general enactment the alteration of the navigable capacity of navigable waters of the United States. Clearly, so far as interstate commerce is concerned therefore, under recognized doctrine, in the absence of an occupation of the field by Congress, a state, acting as to domestic matters, could lawfully affect such a portion of the field of interstate commerce.

The first congressional enactment in this field occurred in provisions of the Rivers and Harbors Act of September 19, 1890. Section 10 of the Act began as follows:

> "SECTION 10. That the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited * * *."

This act in other provisions authorized and directed the Secretary of War to issue permits for certain kinds of obstructions to navigation, which, on the same theory of interpretation subsequently applied to the analogous Act of 1899, gave in effect to the Secretary of War power to permit and authorize reasonable obstructions to navigation.

The Sanitary District of Chicago was created pursuant to the permission in the act of the Illinois Legislature above referred to by vote of the people of the district, and the canal was constructed very largely after the adoption by Congress of the act of 1890.

In the case of *United States* v. *Bellingham Bay Boom Company,* 176 U. S. 211 the words in the portion of Section 10 in the Act of 1890 above quoted, "affirmatively authorized by law," were held to be satisfied with regard to obstructions to navigation authorized by the authorisation of a state. So far as any possible effect upon interstate commerce was involved, therefore, the State of Illinois proceeded fully within its lawful and constitu-

tional powers as long as the act of 1890 remained in force and effect, in permitting the creation of the Sanitary District of Chicago.

On March 3, 1899, the Rivers and Harbors Act of that year became effective, and by Section 10 of that act it was provided:

> "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; * * *"

This act became effective a few months before the connection between the then constructed artificial channel of the Sanitary District and the Chicago River was made, as the result of which connection water first became diverted from Lake Michigan. In exercising its power under the commerce clause to fully regulate this phase of interstate commerce, Congress necessarily imposed a paramount limitation upon the regulations theretofore adopted by the states, but the regulation, when adopted by Congress, did not have the effect of declaring void and unlawful what the State had done, but merely imposed an additional requirement which had to be complied with. As is shown by the first report of the Special Master, the Sanitary District promptly applied for a permit under the provisions of Section 10 of the Act of 1899 to authorize the diversion it desired and this was issued. The limitations of this permit were exceeded by some 200 cubic feet per second in 1903, thereafter remaining within the permit allowance until the year 1907 (Special Master's first report, p. 22).

The regulation of this subject matter by Congress under the provisions of the Act of 1899 here referred to was self-executing, and in the hands of federal officials, and as subsequently occurred was in fact enforced upon

the Sanitary District. At no time during this period of enforcement was it ever suggested that any legislation from the State of Illinois was needed to make effective such enforcement. It is true that the Sanitary District in good faith resisted the enforcement. The first opinion of the court in this case indicates the legal questions which necessarily arose in interpreting the confusing and complicated language employed by Congress in the act of 1899, and the right of the Sanitary District to present its legitimate contentions as to the meaning and effect of that statute in the courts of the United States cannot be challenged or denied. Certainly there devolved upon the State of Illinois no duty with which we are familiar to control or limit the assertion of such right.

In proceeding as it did in authorizing the creation of the Sanitary District, the State of Illinois did not exceed its powers insofar as the rights of the complaining states were involved.

As a matter of fact there is no basis for any claim on the record in this case that the State was advised in 1889 that diversion in the amount contemplated by the state's statute could produce injury to the rights of the complainant states. Although not referred to in detail in the first report of the Special Master, there was introduced in evidence before him a report of a Board of United States Engineers in 1895 which, so far as we are advised, raised for the first time a question as to the effect of the contemplated diversion upon the levels of the Great Lakes. The act only contemplated a 10,000 second foot diversion when the population of the Sanitary District should be 3,000,000 and in 1900 the population only slightly exceeded half of that figure and was, of course, materially less in 1890 when the statute was adopted.

Without seeking to examine the extent to which the Supreme Court, through the exercise of its jurisdiction to settle controversies between states, had established in 1889 any rule for the apportionment of the waters of interstate streams, the rule has since that time become clearly settled. Since this case was decided on the merits, the Supreme Court in the case of *Connecticut* v. *Massachusetts*, 282 U. S. 660 has said (p. 670):

> "The determination of the relative rights of contending states in respect to the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right. * * * It seems that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all the states stand, in point of power and right, under our constitutional system,' and that, upon a consideration of the pertinent laws of the contending states and all other relevant facts, this court will determine what is an equitable apportionment of the use of such waters."

Again in the still later case of *New Jersey* v. *New York*, 283 U. S. 336, the court said (page 343):

> "The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas."

And again in the same opinion at the same page the court said:

> "The removal of water to a different watershed obviously must be allowed at times unless states are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the states concerned."

The State of Illinois, therefore, could to some extent utilize the waters of Lake Michigan. It was entitled to an "equitable apportionment" of these waters. If it exceeded a fair use, it would be subject to control through

the power of this court, but in authorizing a diversion, even of great magnitude, the State proceeded within its lawful authority, subject, however, to the exercise of the controlling power of this court to prevent, through the use of such authority, an unreasonable injury to neighboring states.

These are the rights of the State of Illinois if it be regarded as the active defendant in the litigation and primarily responsible and also if the rule invariably adopted by this Court in all other the cases be applied to Illinois.

Is the decision heretofore made in this case inconsistent with this assertion of right?

The Special Master in his first report held that the Sanitary District was justified in the actions complained of because a permit had been issued to it covering such acts by the Secretary of War under Section 10 of the Act of 1899. *We call the Court's attention to the fact that this permit was issued to the Sanitary District and not to the State of Illinois.* This Court refused to follow the recommendation of that report. It held the permit was justified because of an emergency condition created by the wrongful acts of the Sanitary District. The Court said (Opinion Chief Justice Taft, *Wisconsin* v. *Illinois*, 278 U. S. at 420):

> "It, therefore, is the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis and thus to restore the navigable capacity of Lake Michigan to its proper levels."

The Court's definition of what would be a legal basis for subsequent diversion by the Sanitary District is clearly and definitely shown in the preceding sentence in which the Court says:

> "And in so far as the prior diversion was not for purposes of maintaining navigation in the Chicago

> River, it was without any legal basis because made for an inadmissible purpose."

The direction to the Special Master for the rereference which followed, is indicated in the following concluding expressions from this opinion (278) U. S. at 421):

> "Though the restoration of just rights to the complainants will be gradual instead of immediate, it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project. * * *
>
> "To determine the practical measures needed to effect the object just stated and the period required for their completion, there will be need for the examination of experts; and the appropriate provisions of the necessary decree will require careful consideration. For this reason the case will be again referred to the Master for a further examination into the questions indicated."

Beyond question the Court was dealing solely with the Sanitary District and with the diversion permitted under the permit of the Secretary of War to the Sanitary District, but particularly with the necessity resting upon the Sanitary District of eliminating the emergency which was held within the law temporarily to justify the Secretary of War's permit.

If the Court had been dealing with the State of Illinois as the active defendant, we see no reason for the application to the State of any different or other rule than the usual and invariably rule heretofore adopted in all other similar cases—the doctrine of equitable apportionment. The rule is not discussed in the opinion and no reason for its not being applied is given.

As is clearly shown by the quotations from the opinion above, the case was not considered as one to which this doctrine applied. This is definitely shown by the following quotation from the brief (pp. 177-179)

filed before the Court on the first report of the Special Master on behalf of the defendants, Illinois and the Sanitary District of Chicago:

"VI.

"DEFENDANTS DO NOT ABANDON, AND UNDERSTAND THAT THEY DO NOT LOSE THE OPPORTUNITY, IF THE OCCASION ARISES, LATER TO PRESS, CERTAIN DEFENSES WHICH ARE NOT ARGUED HERE BECAUSE THEY ARE NOT MATERIAL TO SUPPORT THE FINDINGS AND CONCLUSIONS OF THE SPECIAL MASTER.

"The Master has rested the determination of this case on his interpretation of Section 10 of the Act of March 3, 1899, that this statute reposes in the Secretary of War the absolute discretion to authorize defendants' acts as not constituting such an obstruction to the navigable waters of the United States as is inhibited by the statute, and has therefore found it unnecessary to consider the contentions made before him by complainants and now repeated in their briefs:

(a) That the permit of the Secretary of War was permissive merely, and that, therefore, the court should consider the mutual obligations and duties as between complainants and defendants, and, on a sort of modified doctrine of the case of *Cummings* v. *Chicago,* 188 U. S. 410, should conclude that whatever may be the authorization defendants hold from the *United States,* yet as *against complainants* the diversion would be unlawful if the effect of it in any way impairs any rights of complainant states.

(b) That the governing law of this case is the doctrine of riparian rights at common law, and, therefore, if defendants, in any degree diminish the flow of waters to complainants, as lower riparian owners, a cause of action accrues to complainants regardless of the permit of the Secretary of War.

(c) That in this view, whatever authorization may be found in the permit of March 3,

1925, it has no effect on rights and duties as between complainants and defendants, and that, therefore, regardless of the permit, the court is put to the determination of the relative rights of quasi-sovereign states as between each other.

"On this aspect of the case, defendants contended—

(a) That the governing rule in international law as between sovereign states is that there is no servitude in an upper riparian state in favor of a lower state, and that the various treaties creating limited servitude in this regard represent concessions as matters of comity.

(b) That under the doctrine of *Kansas* v. *Colorado,* this court will require such comity as between the quasi-sovereign states of the Union.

(c) That what will thus be required is not, however, an application of the common law of riparian rights, but a fair division of benefits and burdens and as an example that, in *Kansas* v. *Colorado,* although Colorado was taking practically the entire low water flow of the river, and this taking seriously impaired agriculture in the western tier of Kansas counties, yet the court, considering the great benefit to Colorado and the *relatively* small burden to the Arkansas Valley in the State of Kansas, balanced the equities and denied the relief.

(d) That similar consideration should govern here and, regarding the relatively small damage to complainants, and the economic catastrophe to defendants certain to result from injunction, the court should here also deny relief.

"Defendants also showed and urged that the acquiescence of complainants for over a quarter of a century while the great complex sewage, water and electrical system of Chicago was created around and in reliance on this diversion was a bar to the relief sought. Many cases in American and English law were cited in support of this contention.

"Defendants also showed the impairment of these waters for navigation by complainants and the Dominion of Canada chiefly by pollution, but also by

diversions. Defendants also demonstrated that economic requirements of a rapidly expanding population in all states littoral of the lakes had resulted in many artificial changes in terrain and surface covering that had greatly and adversely affected the levels of the lake. On this basis, defendants advanced the defense of unclean hands."

If Illinois is to be regarded as the principal defendant in this case, we respectfully point out that its rights have not been fully determined or decided in anything that has heretofore occurred. The doctrine of equitable apportionment has not been applied as between the complaining states and the State of Illinois.

The Court will bear in mind that defendants are not taking water which otherwise the complaining states would take. They have all of the water they need or require or seek to use. The complaining states are damaged solely by an effect produced by the Chicago taking, upon the levels of the Great Lakes. As between sovereign states of the United States standing, as this Court has so sedulously asserted in all of these cases, upon a plane of equality, before the rights of the sovereign state of Illinois are to be foreclosed, this Court should apply here, as it has in all other cases, the process of determining what is a fair and equitable apportionment of the waters of this great interstate stream. In every other case the rule of the common law which would deny any taking to the upper riparian states has not been applied. Some taking, in each case definitely measured to a large extent by the requirements of the upper riparian state, has been allowed.

We assert with all due deference that before a financial or other obligation may be imposed upon the State of Illinois as distinguished from the Sanitary District of Chicago, the actual extent of wrong claimed to be

perpetrated by the State must be measured in accordance with the judicial process applied by this Court in all other cases. *Illinois as a sovereign state can only be regarded as wrongfully taking water when the taking is in excess of the share which a fair and considered judicial determination allots to it under the doctrine of equitable apportionment, and no such determination has taken place in these proceedings.*

We also assert that insofar as any limitation imposed by the power of Congress to regulate commerce is concerned, the State of Illinois proceeded lawfully in bringing about the existence of the Sanitary District of Chicago and likewise did not exceed its authority in law insofar as the rights of the complainant states were concerned. Since subsequently Congress enacted comprehensive legislation regulating the entire subject matter, no further action was required from the State to direct this municipal corporation, its creature, to comply with the Act of Congress. That law applied directly to the municipality and needed no authority for such application from the State of Illinois.

There are no later enactments of the Legislature of Illinois upon which can be based any assertion of such action by the State as might lead to a claim of injury under the circumstances here to the complaining states.

In 1903 by the Act of May 14th (session laws of Illinois, 1903, p. 92) referred to in the Special Master's first report at p. 19, the Legislature of Illinois extended the corporate limits of the Sanitary District of Chicago to include the Calumet Sag Channel and authorized a diversion from Lake Michigan through this channel, to be included, however, within the original authority. As we have pointed out above, at that time the Sanitary District was in fact complying with the federal regula-

tion, and although at the end of 1903 it had exceeded the permitted average for the year by some 200 c. f. s. it remained within the permit allowance until the end of 1907. Obviously the Legislature of Illinois in adopting the Act of 1903 had no occasion to assume that any violation of federal regulation was either required or contemplated, particularly in view of the fact that the Act of Congress permitted the federal requirements to be changed from time to time as occasion might demand.

Certain acts of the Legislature of Illinois to which reference has been made upon the hearing before the present Special Master include a number of enactments, either increasing the tax rate of the District or authorizing the issuance of bonds without referendum, all clearly adopted for the purpose of facilitating the construction program needed to permit compliance with the decree in this case. We assume no contention will be based upon these enactments, that as a result thereof the State of Illinois became responsible for any alleged injury to the complaining states.

Our position, therefore, is that what Illinois did by legislative act in authorizing the creation of the Sanitary District was lawfully within its constitutional power and within its right insofar as its obligation to sister states was concerned. In view of the fact that the acts of its municipal corporation, the Sanitary District, were subject to comprehensive regulation by Congress, designed to protect the rights of the complainant states in this proceeding, we likewise urge that Illinois cannot be criticized for any failure by its own Legislature to so limit the powers of the Sanitary District as to compel the latter to avoid the possibility of injury either to commerce or the rights of the complainant states.

B.

UNDER THE LIMITATIONS OF THE CONSTITUTION OF THE STATE OF ILLINOIS THE STATE HAS DONE EVERYTHING IT CAN DO OR COULD BE REQUIRED TO DO TO FACILITATE THE CARRYING OUT OF THE DECREE IN THIS CASE.

In the first place, it should be noted that there are not here involved any constitutional provisions which were adopted after the date of the creation of the Sanitary District in 1889. There was an amendment to the Constitution in 1908 dealing with the Illinois waterway which was adopted by popular vote and authorized a $20,000,000.00 bond issue for the construction of the waterway. This is not involved in the discussion here. It is plain, therefore, there is no basis for any suggestion that Illinois has so modified its constitutional limitations as to warrant any claim that by such constitutional change the State has attempted to avoid the carrying out of the decree in this case or to prevent its full capacity being so exerted.

The provisions of the Illinois Constitution which impose definite limitations upon the capacity of the State to expend its own funds or in any way incur obligations to carry out the duty of the Sanitary District of Chicago or to issue bonds or impose a State tax for such purposes, are as follows:

Section 18 of Article IV provides in part as follows:

> "* * * the State may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate $250,000.00; and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created and to no other purpose; *and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war (for payment of which the faith of the State shall be*

pledged), *shall be contracted unless the law authorizing the same shall, at the general election, have been submitted to the people,* and have received a majority of the votes cast for members of the General Assembly at such election. The General Assembly shall provide for publication of said law, for three months, at least, before the vote of the people shall be taken upon the same; and provision shall be made at the time for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue; which law, providing for the payment of such interest by such tax, shall be irrepealable until such debt be paid: *and, provided further,* that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted." (Italics ours.)

Section 20 of Article IV reads in full as follows:

"The State shall never pay, assume, or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to, or in aid of, *any public* or other corporation, association or individual." (Italics ours.)

Section 8 of Article IX (Revenue) reads in full as follows:

"County authorities shall never assess taxes, the aggregate of which shall exceed 75c per $100 valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by the vote of the people of the county."

Section 9 of Article IX reads in full as follows:

"The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

Section 10 of Article IX reads in full as follows:

"The General Assembly shall not impose taxes

upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for payment of the corporate debts of a municipal corporation."

Under the provisions of Sections 18 and 20 of Article IV above quoted as construed by the courts of Illinois, the General Assembly cannot authorize the assumption by the State of the debt of a municipal corporation of the State, lend the credit of the State to such municipality nor in anywise pay or assume such debts. And the General Assembly cannot even of its own act authorize any indebtedness for any purpose without a majority vote of the people at a general election.

In *Fergus* v. *Brady,* 277 Ill. 272, at page 278, the Supreme Court of Illinois says:

"These provisions of the constitution and statute are clear and unambiguous in terms and their purpose and object can not be misunderstood. Section 18 prohibits appropriations in excess of the revenue authorized by law to be raised in the period for which appropriations are made, but necessarily revenue, whether derived from one source or another in the future, must always be estimated and never can be a fixed and certain sum. Circumstances may occur that will cause the reasonable expectations of the General Assembly as to the amount of revenue to miscarry or not to be fulfilled, so that there may be a temporary deficiency. To meet that condition which may arise from failure in making collections of taxes or result from decreased revenue from other sources, the section provides that in case of failure of revenue the General Assembly may contract debts, never to exceed $250,000. This debt is only to be created by borrowing money,—not by incurring debts or making contracts,—since the sec-

tion requires that the moneys thus borrowed shall be applied to the purpose for which they were obtained or to pay the debt thus created, and to no other purpose. No other debt can be contracted, except for the purpose of repelling invasion, suppressing insurrection or defending the State in war, except upon a vote of the people at a general election."

In the case of *Madison County* v. *The People, ex rel.* 58 Ill. 456, the court construed a provision of the prior constitution of Illinois, adopted in 1848, which preceded the present constitution (Section 38, Article III), which declared:

> "The credit of the State shall not, in any manner, be given to, or in aid of, any individual, association or corporation."

This language is less definite in its terms than the provisions of Section 20 which practically repeats the earlier provision but uses the expression "any public or other corporation, association, or individual". The particular act in question in the Madison County case was not held to violate the constitutional provision, but the court clearly indicates that under that provision there would be a limitation upon the State's using its credit in aid of a county. The court said:

> "The first question thus presented, is, whether there is any warrant in the constitution of 1848, for the legislation under which this subscription was made. The first portion of that instrument, referred to as being violated, is the 38th sec. Art. 3, which declares, 'The credit of the State shall not, in any manner, be given to, or in aid of, any individual, association or corporation.' It will be perceived that this law does not purport to give the State's credit to this company, but simply to authorize a small district of the county to give its credit and aid to the corporation. It neither gives directly nor indirectly, money from the treasury, or bonds, or property of the State, to this road. We fail to see that this section has any bearing on the validity of the law under consideration. The State in nowise became

liable for the payment of the county bonds or the interest thereon, but leaves the persons and property of the district liable for their payment."

In the case of *Wetherell* v. *Devine,* 116 Ill. 631, decided in 1886, the court construed Sections 9 and 10 of Article IX of the Constitution of Illinois, above quoted. The court said:

"These sections in the constitution of 1870, or a similar section in the constitution of 1848, have been frequently construed by this court, and by the Supreme Court of the United States. *Updike* v. *Wright,* 81 Ill. 49, and cases there cited; *Weightman* v. *Clark,* 103 U. S. 256; *County of Livingston* v. *Darlington,* 101 id. 407; *Hackett* v. *Ottawa,* 99 id. 86; *Township of Elmwood* v. *Marcy,* 92 id. 289; *Cornell* v. *The People,* 107 Ill. 372. The decisions in these cases law down three propositions, as clearly deducible from the sections here quoted: First, the General Assembly can not grant the right to assess and collect taxes to any other than the corporate authorities of the municipalities or districts to be taxed; second, taxation by such municipal or corporate authorities must be for corporate purposes; and third, such taxation can not be imposed without the consent of the taxpayers to be affected.

"The expenses incurred by the election commissioners, which the city is required to pay, are for office rent, clerk hire, stationery, printing, books, registers, poll lists, blanks, ballots, ballot-boxes, etc. These expenses are *incurred* by the election commissioners. They are *audited* by the county judge, and warrants for them are drawn by the county judge, but it is 'the governing authority' of the city, which is intrusted with the duty of *providing for their payment.* (Art. 7, sec. 277.) The assessment and collection of taxes for the payment of these expenses are not taken out of the hands of the corporate authorities of the city, but are expressly left with those authorities.

"But it may be said that the power to impose a tax, and the power to create a debt to be discharged by the levy of a tax, are substantially the same thing, and that, therefore, the election commission-

ers who incur these expenses, and thereby create the debt to be discharged by taxation, are the authorities, who impose the tax. If this be so, then the question arises, who are the 'corporate authorities,' referred to in the constitution? We have defined them to be those authorities, who are either directly elected by the population to be taxed, or appointed in some mode, to which they have given their assent. (*Harward* v. *St. Clair Drain. Co.* 51 Ill. 130; *Hessler* v. *Drainage Comrs.* 53 id. 105; *Cornell* v. *The People, supra.*)"

These decisions are definite interpretations of the constitutional provisions in question. We assume in this proceeding the ordinary rule of the Supreme Court of the United States will be followed and that the court will be bound by the interpretation placed upon the Constitution of Illinois by its Supreme Court.

It is thus apparent that the Legislature of Illinois in authorizing the creation of the Sanitary District of Chicago complied with these provisions, particularly Section 9 of Article IX above, in providing that only by an election of the people within the district could the district come into existence. In effect this allowed the people of the district to decide whether to authorize and create the "corporate authorities" of the district. The taxing power of the district must be exercised by those authorities and cannot be exercised by the Legislature of Illinois.

The Legislature could authorize the Sanitary District to impose taxes at a higher rate than those now imposed but in the face of existing circumstances, particularly the inability at present to collect present taxes, the wisdom of not having authorized an increase in the district's tax rate is apparent. There has been no claim or suggestion so far as we are advised in this case, that taxes in sufficient amounts have not been levied by the district and we assume there will be no claim made of

any possible failure on the part of the Legislature of Illinois to amply provide a sufficient use of the taxing power within the district to be exercised as is required by the above provision of the constitution by the corporate authorities for carrying out the provisions of the decree in this case.

Under the constitutional provisions above the Legislature of Illinois could not itself incur or create a State debt and even if it were to submit the creation of such a debt to referendum vote of the people, it would not have authority to submit to popular vote the creation of a debt for the purpose of the Sanitary District of Chicago. So far as finances are concerned, therefore, the Legislature of Illinois has no power in the premises.

It seems to us idle speculation to suggest that the Legislature might at some period in the past have limited the powers of the Sanitary District in reference to the diversion or in reference to a more mandatory requirement compelling compliance by the district with regulation to the federal government. Even if it be assumed that some obligation along this line rested upon the Legislature of Illinois, we know of no way under which the performance of such an obligation could be enforced. Article 3 of the constitution of Illinois reads as follows:

> "The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

The doctrine therein set forth of the strict division of powers is universally followed by the courts of Illinois. Even did this not exist, it has always been a rule of government in the United States that the judicial department cannot control the exercise of legislative discretion.

There is no power, therefore, in the courts of Illinois to interfere with, control or force an exercise of discretion by the Legislature of the State in dealing with the problems of the Sanitary District of Chicago and that lack of power results from specific limitations in the constitution of the State. Even if it be assumed that the Supreme Court of the United States in this proceeding might define some obligation resting upon the Legislature of Illinois not performed, if that court should seek by judicial process to compel such performance, it would be violating the fundamental laws of the State and would be exercising a power which the courts of the State clearly could not use.

We have pointed out above very briefly, first, the history of the acts of the State of Illinois, particularly some of those facts which have never received separate consideration at the hands of this Court, indicating clearly, as we contend, that the State proceeded within its full right and power in authorizing the creation of the Sanitary District. We have shown by an analysis of the decision herein that the sovereign rights of the State of Illinois have never been considered nor decided, and that under settled rules of this court the State is entitled to have made an equitable apportionment of the waters of Lake Michigan before any of its acts can be held to be unlawful. We have also pointed out the essential limitations adopted by the people of Illinois embodied in their Constitution, all of which were in existence long prior to any of the circumstances leading to this litigation. We respectfully suggest that this Court should not now assume the existence of a legal liability on the part of the State of Illinois. We ask on behalf of the State the customary consideration before separate and distinct liability be imposed upon it.

The recommendations of the Special Master in effect changed these proceedings from bills in equity seeking injunctions to legal actions seeking to collect a money judgment.

This is well suggested by the following statement of Special Master McClennan (McClennen Report, p. 44):

> "If, instead of this injunction, this Court had deemed the effect on third parties so intolerable, that the injunction must be denied and the Court, in the common way, had retained the bill for the assessment of damages sustained by the complainants and had entered a decree for payment of the amount, by the wrongdoers, that decree would be a debt of the State of Illinois, as well as of the Sanitary District. The duty to pay damages for future wrongful diversions would continue, as a duty of the State. These works are to render the injunction tolerable and so to prevent a liability for continued diversions. Therefore Section 20 does not stand in the way, if this Court enters a decree that the State complete the works."

From this aspect we also assert the right of the sovereign State of Illinois to have its legal liability expressly and separately considered, before this Court, in this proceeding, should impose upon it a financial obligation.

IV.

WE RESPECTFULLY INSIST THE SPECIAL MASTER RECOMMENDS THAT THIS COURT SHOULD EXERCISE POWERS NOT POSSESSED BY IT, UNDER ITS JURISDICTION TO SETTLE CONTROVERSIES BETWEEN STATES.

In dealing with the very grave questions of constitutional power presented by the extraordinary recommendations of the Special Master we approach a field where precedents are few. No case whatever so far as we have been able to find presents any similarity to the recom-

mendations here involved. We suggest that this fact alone casts a doubt upon these recommendations. A mere reading of the summary of previous authorities and decisions involving this fundamental question as outlined at pages 122 to 125 of the Special Master's report indicates the hesitation the courts have displayed, and particularly this court, in seeking to exercise powers of the nature here involved.

The recommendations of the Special Master transcend the limits of judicial authority in that:

(a) It is recommended that the court by mandatory decree control and direct an exercise of legislative discretion by the Legislature of Illinois and also by the Governor of Illinois.

(b) It is recommended that the court direct the Legislature of Illinois to exercise a portion of the legislative authority of the people of Illinois which the people by their Constitution have not delegated to the Legislature but have expressly reserved to themselves.

(c) It is recommended that the court direct the Legislature of Illinois to disregard and set aside clear and specific commands of the Constitution of Illinois.

We respectfully submit that in these respects and in many others the recommendations of the Special Master ask this court to go beyond the limits of its constitutional judicial power.

A.

THE RECOMMENDATION THAT THIS COURT DIRECT, CONTROL AND COMMAND AN EXERCISE OF CONSTITUTIONAL LEGISLATIVE DISCRETION BY THE GENERAL ASSEUBLY OF ILLINOIS AND BY THE GOVERNOR OF ILLINOIS IS BEYOND THE POWER OF THIS COURT IN THAT IT SEEKS TO HAVE THE COURT INVADE THE PROVINCE OF A LEGISLATIVE FUNCTION AND THEREFORE WOULD INVOLVE AN EXERCISE OF POWER ESSENTIALLY NOT JUDICIAL IN ITS NATURE.

We assume there can be no doubt about the fact that the Master's recommendations include the suggestion that this court direct and control an exercise of legislative authority by the General Assembly of Illinois and by the Governor of Illinois. His report says in part in summarizing his conclusions at page 27:

> "The financial measures on the part of the State of Illinois which are reasonable and necessary in order to carry out the decree of this court are in the enlargement of the decree by adding to it a paragraph providing that the State of Illinois be *enjoined to appropriate through its General Assembly before July 1st, 1933 the sum of thirty-five million dollars* * * * and the same amount per year for each year * * * until all the same shall have been fully completed; and to incur indebtedness therefor and for the purposes aforesaid and no other to issue and to sell bonds of the State of Illinois for the amounts so appropriated and *on such terms of payment and maturity and at such rates of interest as the General Assembly shall determine.* * * *"

The decree is to enjoin the State to appropriate through its General Assembly. This is the only way in which the State can appropriate money and requires a legislative act by the General Assembly. The decree is specifically to direct action by the General Assembly including an admitted exercise of discretion of that body

in determining the "terms of payment and maturity * * * and rates of interest." The fact that the recommended decree is not mandatory as to terms of payment, maturity and interest makes it clear that in directing action by the General Assembly, since these terms of the required bonds must be specific in order to be salable, to comply with the decree the General Assembly must exercise an uncontrolled discretion as to these matters. The decree does require such action.

At page 42 of his report the Special Master says:

> "The State of Illinois is under a liability which it is within the jurisdiction of the Supreme Court of the United States to compel it to satisfy out of the resources of the State. The State has among its resources, the inherent power to contract for construction and to borrow money. When the Constitution of the United States by the judgment of its Supreme Court obliges the State to use that resource, any self-imposed prohibition to perform that obligation is repugnant to the supreme constitution and fails. A vote of howsoever large a number of people would be unconstitutional."

By the same reasoning a vote of the Legislature refusing to adopt a measure meeting the terms of the proposed decree would be unconstitutional. But what would be substituted for such action, whether void or not, required to create an obligation of the State of Illinois? It can only come into existence by legislative act. The decree requires such act. A legislative act can only be performed by the vote of Legislators. The right to vote implies the right to vote for or against. The decree would deny the essence of the right to vote in that the right to vote against such a measure would be denied. *We submit it would be impossible to find a more complete invasion of the legal constitutional discretion imposed upon each member of the General Assembly of Illinois than in this recommended decree.*

The extent to which the judiciary may invade the province of the Legislature was carefully considered by the Supreme Court of Illinois in the case of *People* v. *Thompson,* 155 Ill. 451. In this case the court reviewed the constitutionality of an act of the Legislature apportioning the State into senatorial districts. Section 6 of Article IV of the State Constitution directed the General Assembly to apportion the State every ten years in a manner in some particulars definitely prescribed. Among other provisions as to the nature of apportionment so provided the Constitution required that "senatorial districts shall be formed of contiguous and compact territory bounded by county lines and contain, as nearly as practicable, an equal number of inhabitants. * * *" The Act before the Court was attacked as failing to comply with these requirements. The court held the Constitution imposed in the Legislature a discretion in applying the requirements of compactness, etc., although on the facts involved doubt as to the way in which these requirements were met was clearly proper. The fundamental question discussed in the case was the extent to which courts could review an exercise of legislative discretion. The court said at page 474:

> "That there are many constitutional duties imposed upon other departments of the government which cannot be enforced by the courts, and the manner of compliance with which is left to the sole and final determination of the department upon which the duty is imposed, will not be denied. The provision relating to senatorial apportionment required the legislature to apportion the State in 1871 and every ten years thereafter. But the first act was not passed until 1872 and the last in 1893, but it is not contended that these statutes are unconstitutional because not passed within the years prescribed. The constitution of the State of New York contained similar provisions, and the Court of Appeals held that an apportionment act was not in-

valid because passed some years later than the prescribed time, but that the constitution was so far mandatory as to make the duty a continuing one, which, upon failure of one legislature to discharge it, was cast upon its successor. (*Rumsey* v. *People*, 19 N. Y. 41; *People* v. *Rice*, 135 id. 473.) Nor have the courts any power to compel the legislature to act in any case, however imperatively the duty may be imposed upon that body to act, so that if the legislature should wholly neglect or refuse to pass an apportionment act after the lapse of ten years, and should leave in force an act under which the districts had become grossly unequal in population, the people would have no remedy, outside of a constitutional amendment, except to elect a General Assembly which would perform the duty. *Giddings* v. *Blacker*, 93 Mich. 1; *People ex rel.* v. *Bissell*, 19 Ill. 229; *People ex rel.* v. *Cullom*, 100 id. 472; *Myers* v. *English*, 9 Cal. 341.

Section 22 of article 4 prohibits the General Assembly from passing any local or special laws in any of twenty-three enumerated cases, and then provides that 'in all other cases where a general law can be made applicable no special law can be enacted'; and it is decided by this court that the question whether or not a general law can be made to apply in a case not falling within those specifically enumerated is addressed to the legislature, and not to the courts, and that its decision in that respect, involved in the passage of the act, is final, and the courts have no power to revise, reverse or annul it. (*Owners of Lands* v. *People*, 113 Ill. 296; *People* v. *Harper*, 91 id. 357; *Johnson* v. *Joliet and Chicago Railroad Co.* 23 id. 124.) Again, section 12 of article 5 provides that 'the Governor shall have power to remove any officer whom he may appoint, in case of incompetency,' etc., and it is decided that, this power being vested in the Governor, he alone has the power to determine the question of incompetency, and may make such determination from the best light he can get, 'and that it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty, his action not being subject to their revision.' *Wilcox* v. *People*, 90 Ill. 186; *People, ex*

rel. v. *Cullom*, 100 id. 472; *People ex rel.* v. *Bissell*, 19 id. 229.

Many other instances might be cited, were it necessary, where the decision of the other departments of the State government are not subject to reversal by the courts. Full power and final authority to perform the different governmental functions must be lodged somewhere, and it is the duty of all public functionaries to respect the disposition of the several powers of government as made by the constitution. It would be a new doctrine, and one fraught with much danger, to hold that the courts may reverse or annul acts of the other departments in matters committed by the constitution to the judgment and determination of such other departments, or in matters where it is a question of serious doubt whether they are so committed or not, even although the courts might be satisfied that in the determination of the question by the department to which it is committed the constitution has not been properly observed. The only remedy for dereliction of duty in such cases lies in the frequency of elections, by which the people may choose others to serve them, and in the impeachment and removal from office of those made subject to that punishment. This view does not deny the jurisdiction of the court to pass upon the constitutionality of a statute making a senatorial apportionment, to the same extent as in other cases, but it does deny the power of the court to follow the statute any further than the boundary line enclosing the discretionary power of the legislature, and to invade that discretion, in any case.

It was not discretionary with the legislature whether it would, or not, comply with the four restrictions before mentioned, upon its power, respecting the observance of county lines, the division of counties, the minimum number of inhabitants necessary to form a district, and the contiguity of territory in forming districts. Nor was it discretionary as to whether or not that body would, subject to said limitations, apply the principles of compactness of territory and approximate equality in population in making the apportionment; but we do hold that it was a question for its final determination as to what

approximation could or should be made toward perfect compactness of territory and equality in population,—and this, too, though treating this requirement of the constitution as mandatory on the legislature. In other words, if it clearly appeared that in the formation of any district the requirement of compactness of territory and equality in population had been wholly ignored, had not been considered or applied at all, to any extent, then the statute would be clearly unconstitutional. But if it has been considered and applied, though to a limited extent only, subject to the other more definitely expressed limitations, then the General Assembly has not transcended its power, although it may have very imperfectly performed its duty, and the act is valid. That no department of the State government has any discretion as to whether or not it will perform a constitutional duty, and that constitutional provisions are to be treated as mandatory rather than as directory, do not militate against the position here assumed, for however peremptorily the performance of the duty may be enjoined by the constitution, it cannot be enforced, or the manner of its performance be revised, by the courts, in a matter committed by the constitution to the final decision of such department. (Cooley's Const. Lim. 78-83.) The same eminent authority above quoted from says: 'Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory, only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives.' Cooley's Const. Lim. 129."

In its essence the exercise of power recommended by the Special Master is exercise of the power of taxation, since bonds are the mere postponement of taxes. That judicial power, because of the lack of right to invade legislative discretion, does not extend to the exercise of the right to tax has been frequently decided. We need no other authority for this statement than the case of

Meriwether v. *Garrett*, 102 U. S. at 472; 47 L. ed. 197. In the opinion in that case the court said:

> "So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.
>
> It is the province of the courts to decide causes between parties and, in so doing, to construe the Constitution and the Statutes of the United States, and of the several States, and to declare the law and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.
>
> This doctrine is not new in this court. It has been

repeatedly asserted, after the most mature consideration. It was asserted in *Rees* v. *Watertown.* * * *

In disposing of it (a question certified to this court) we said: 'We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important.' 19 Wall. 116 (86 U. S., XXII., 74)."

The same opinion states, in discussing the previous decision in *Heine* v. *Levee Commissioners,* 19 Wall. 655 (86 U. S. XXII 223):

"And when the case came before this court, we here said, Mr. Justice Miller delivering the opinion: 'The power we are here asked to exercise is the very delicate one of taxation. This power belongs, in this country, to the legislative sovereignty, state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion of the judiciary of the Federal Government of the legislative functions of the State Government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee.'

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose. If such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal Court, it cannot seize the power which belongs to the Legislative Department of the State and wield it in their behalf."

The court said further:

"The federal judiciary has never failed, so far as it was in its power, to compel the performance of all lawful contracts, whether of the individual, or of the municipality, or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it, and apply the proceeds. In some instances, where the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax, nor provide for one, the federal judiciary cannot assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the federal judiciary cannot remove them and put others more competent in their place. If the State appoints no officers of collection, the fed-

> eral judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of state of state legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the Legislative Department of the State."

These statements are not in conflict with the assertions and definitions of the peculiar judicial power here involved set forth in the opinion of this court in *Virginia* v. *West Virginia*, 246 U. S. 565. In asserting the power to enforce its judgments in controversies between states, the court discusses at length arguments to show either limitations upon or lack of such power.

Power to enforce an injunction to prohibit acts which result in a nuisance, which is the only character of decree heretofore entered in this case, is *res adjudicata* in this proceeding and has been so frequently asserted and exercised by this court as not to be open to further doubt under circumstances proper for its application. The power which we challenge here, however, is the exercise of what might be termed an ancillary authority to control the legislative discretion of the General Assembly of Illinois by requiring that body to vote and approve an issue of bonds *not for the purpose of paying a judgment* or *answering an obligation defined by this court in the exercise of its jurisdiction to settle controversies between states.* On the contrary it is merely an ancillary authority to compel the State of Illinois to expend money through or for one of its own municipal corporations in order that the people of that corporation may be protected from evil results inevitably to follow if the injunction heretofore allowed be enforced according to its terms.

The decision last referred to is distinguishable from the instant case because the obligation involved arose

prior to the creation of the defendant state and was incurred as an inseparable part of the bringing into being of the state, and in addition was embodied in an act of Congress. The court in the opinion referred to concluded its discussion of the nature of powers in the following expressions:

> "The State, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even although their exertion may operate upon the governmental powers of the state, we are brought to consider the second question, which is:
>
> 2. What are the appropriate remedies for such enforcement?
>
> Back of the consideration of what remedies are appropriate, whether looked at from the point of view of the exertion of equitable power or the application of legal remedies extraordinary in character (mandamus, etc.), lies the question what ordinary remedies are available, and that subject must necessarily be disposed of. As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are Federal powers, and, comprehensively considered, are sustained by every authority of the Federal government, judicial, legislative, or executive, which may be appropriately exercised. And confining ourselves to a determination of what is appropriate in view of the particular judgment in this cause, two questions naturally present themselves: (a) the power of Congress to legislate to secure the enforcement of the contract between the states; and (b) the appropriate remedies which may by the judicial power be exerted to enforce the judgment. We again consider them separately."

After asserting the power of Congress to legislate as to the enforcement of a contract to which it was a party,

the court discusses "the appropriate remedies under existing legislation."

The court said:

> "The remedy sought, as we have at the outset seen, is an order in the nature of mandamus commanding the levy by the legislature of West Virginia of a tax to pay the judgment. In so far as the duty to award that remedy is disputed merely because authority to enforce a judgment against a state may not affect state power, the contention is adversely disposed of by what we have said. But this does not dispose of all the contentions between the parties on the subject, since, on the one hand, it is insisted that the existence of a discretion in the legislature of West Virginia as to taxation precludes the possibility of issuing the order, and, on the other hand, it is contended that the duty to give effect to the judgment against the state, operating upon all state powers, excludes the legislative discretion asserted and gives the resulting right to compel. But we are of opinion that we should not now dispose of such question, and should also now leave undetermined the further question, which, as the result of the inherent duty resting on us to give effect to the judicial power exercised, we have been led to consider on our own motion,—that is, whether there is power to direct the levy of a tax adequate to pay the judgment and provide for its enforcement irrespective of state agencies. We say this because impelled now by the consideration of the character of the parties which has controlled us during the whole course of the litigation, the right judicially to enforce by appropriate proceedings as against a state and its governmental agencies having been determined, and the constitutional power of Congress to legislate in a twofold way having been also pointed out, we are fain to believe that if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the states of the Union to compel it to discharge a plain duty resting upon it under the Constitution. Indeed, irrespective of these considerations, upon the assumption that both

the requirements of duty and the suggestions of self-interest may fail to bring about the result stated, we are nevertheless of the opinion that we should not now finally dispose of the case, but, because of the character of the parties and the nature of the controversy,—a contract approved by Congress and subject to be by it enforced,—we should reserve further action in order that full opportunity may be afforded to Congress to exercise the power which it undoubtedly possesses.

Giving effect to this view, accepting the things which are irrevocably foreclosed,—briefly stated, the judgment against the state, operating upon it in all its governmental powers, and the duty to enforce it, viewed in that aspect,—our conclusion is that the case should be restored to the docket for further argument at the next term after the February recess. Such argument will embrace the three questions left open: 1. The right, under the conditions previously stated, to award the mandamus prayed for. 2. If not, the power and duty to direct the levy of a tax, as stated. 3. If means for doing so be found to exist, the right, if necessary, to apply such other and appropriate equitable remedy by dealing with the funds or taxable property of West Virginia, or the rights of that state, as may secure an execution of the judgment. In saying this, however, to the end that if, on such future hearing provided for, the conclusion should be that any of the processes stated are susceptible of being lawfully applied (repeating that we do not now decide such questions), occasion for a further delay may not exist, we reserve the right, if deemed advisable, at a day hereafter, before the end of the term or at the next term before the period fixed for the hearing, to appoint a master for the purpose of examining and reporting concerning the amount and method of taxation essential to be put into effect, whether by way of order to the state legislature or direct action, to secure the full execution of the judgment, as well as concerning the means otherwise existing in the state of West Virginia, if any, which, by the exercise of the equitable

powers in the discharge of the duty to enforce payment, may be available for that purpose.

And it is so ordered."

This court, therefore, expressly refused to assert that it had power to control the discretion of the Legislature of West Virginia involved in the levy of a tax by that state to pay the judgment. The court also did not decide whether judicial power to settle controversies included the power and duty to direct the levy of a tax.

In connection with other contentions involved in the present proceeding, it should be clearly and definitely noted that there was no suggestion or claim on the part of the State of West Virginia that the proposed mandamus to compel its Legislature to levy a tax would require the Legislature of West Virginia to violate any of the provisions of the Constitution of that State, or to exercise any portion of legislative power reserved by the Constitution to the people of the State and not granted to the Legislature.

We respectfully submit on the authorities cited above and for the reasons therein set forth, judicial power does not include the power to control legislative discretion, it does not comprehend the power to tax, and still less may a Federal Court invade the unquestioned legislative authority of State government.

B.

THE RECOMMENDATION OF THE SPECIAL MASTER THAT THIS COURT CONTROL BY MANDATORY DECREE AN EXERCISE OF LEGISLATIVE DISCRETION OF THE GENERAL ASSEMBLY OF ILLINOIS IS BASED UPON A COMPLETE MISCONCEPTION BY THE SPECIAL MASTER OF THE CONSTITUTION OF ILLINOIS THAT ALL LEGISLATIVE AUTHORITY UNDER THAT CONSTITUTION IS VESTED BY THE PEOPLE IN THE GENERAL ASSEMBLY. THIS BASIC MISCONCEPTION INVALIDATES HIS ENTIRE CONCLUSION. THE CONSTITUTION OF ILLINOIS RESERVES TO THE PEOPLE LEGISLATIVE POWER TO INCUR A DEBT AND LEVY A TAX FOR PAYMENT THEREOF.

Special Master McClennen in his report (pp. 40 and 41), interprets Section 1 of Article IV of the Illinois Constitution which reads:

> "SEC. 1. The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

He bases his interpretation upon the decision of the Supreme Court of Illinois in the case of *People* v. *Barnett,* 344 Ill. 62, 66, 76. We quote below in parallel columns on the right the portion of this opinion cited by the Special Master; on the left the complete language of this part of the opinion which, we submit, requires a directly contrary construction of the constitutional provision in question to that adopted by the Special Master:

"Thus all the legislative power inherent in the people of the State of Illinois has been vested in the General Assembly, except in those cases in which the power has by express limitation or necessary implication been withheld. Since it alone has the power the General Assembly has also the duty, and upon it alone rests the full responsibility, of legislation. This power it may not delegate to any other officers or persons or groups of persons, or even to the whole body of the people, or to a majority of the voters of the State voting at a general election or at a special election. The constitution has made no general provision for a referendum of any act of the General Assembly to a vote of the people of the whole state to determine whether or not that act shall become a law. By section 5 of article II of the constitution it is provided that no act of the General Assembly authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same and be approved by a majority of all the votes cast at such election for or against such law. By the amendment of the constitution which became section 34 of article 4 of the constitution it was provided that no law based on that amendment affecting the municipal government of the city of Chicago should take effect until such law should be consented to by a majority of the legal voters of the city voting on the question at any election, general, municipal or special. In cases of this kind the General Assembly was not only permitted, but was required, to submit its action by a referendum to the people of the city or the State, and its acts in such cases could not go into effect or in any manner be in force until the required majority of voters had consented."

"The Supreme Court of Illinois (*The People* v. *Barnett*, 344 Illinois 62, 66, 76) has defined this section emphatically: 'Thus all the legislative power inherent in the people of the State of Illinois has been vested in the General Assembly, except in those cases in which the power has by express limitation or necessary implication been withheld. Since it alone has the power, the General Assembly has also the duty, and upon it alone rest the full responsibility, of legislation. This power it may not delegate to any other officers or persons or groups of persons, or even to the whole body of the people, or to a majority of the voters of the state voting at a general election or at a special election. The constitution has made no general provision for a referendum of any act of the General Assembly to a vote of the people of the whole State to determine whether or not that act shall become a law."

"We hold that under the constitution of Illinois the General Assembly is the sole depository of the legislative power of the State; that it has no power to delegate its general legislative power, and may not refer a general act of legislation to a vote of the people of the State to decide whether it shall have effect as a law except where the constitution requires such reference; that the rule against the delegation of legislative power is not violated by vesting in municipal corporations certain powers of legislation on subjects of purely local concern connected with their municipal affairs, nor by local option laws the application of which to particular localities is made dependent upon their adoption by the voters of such localities, and that the act of June 14, 1929, to amend section 2 of an act to authorize judges of courts of record to appoint jury commissioners and prescribing their powers and duties, is an unconstitutional delegation of legislative powers and had no effect to change the Jury Commissioners act or to authorize the selection of women as jurors."

"We hold that, under the constitution of Illinois, the General Assembly is the sole depository of the legislative power of the State; that it has no power to delegate its general legislative power, and may not refer a general act of legislation to a vote of the people of the State to decide whether it shall have effect as a law except where the constitution requires such reference."

With all due deference to the Special Master we respectfully suggest that in the very opinion upon which he relies, the Supreme Court of Illinois clearly shows the existence of limitations upon the legislative power of the General Assembly. These are limitations which in their essence are reservations of legislative power to be exercised solely by the people of Illinois. The expressions that the Legislature is the sole repository of legislative power are obviously in general correct, but this opinion especially recognizes existing exceptions to this general statement.

We deal in this case with one of those exceptions. Section 18 of Article 4 of the Illinois Constitution is an express limitation on the power of the Illinois Legislature to create debts. And in defining the process and nature

of such debt creation, the Constitution expressly provides:

> "* * * The State may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate $250,000.00. * * * And no other debt, except for the purpose of repelling invasion, suppressing insurrection or defending the State in war (for payment of which the faith of the State shall be pledged), shall be contracted unless a law authorizing the same shall, at the general election, have been submitted to the people and have received a majority of the votes cast for the members of the General Assembly at such election * * * The General Assembly shall provide for the publication of said law and for three months at least before the vote of the people shall be taken upon the same; a provision shall be made at the time for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue; which law, providing for the payment of such interest by such tax, shall be irrepealable until said debt be paid, and, provided further, that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted."

We respectfully submit there can be no doubt as to the proper interpretation of these provisions. The Constitution denies to the General Assembly the power to create a debt or power to authorize a tax for the payment of a debt. The sole legislative function of the General Assembly is to adopt for submission to the people laws providing for these objections. The General Assembly may decide in its legislative discretion not to adopt such laws but it possesses no legislative authority to enact such laws. They come into existence and become legally effective only when approved by the required vote of the people. This is a reservation of legislative power by the people of Illinois.

The Special Master states his interpretation of the decision in *People* v. *Barnett* above as follows:

"The constitution of Illinois does not require a

> vote of the people to validate an act of the General Assembly to raise at once in the only possible way and to expend the money directed by a valid decree of the Supreme Court of the United States and necessary for the performance of that decree."

As shown by the quotation from the Constitution of Illinois above, no debt can be created except in the manner therein specified and no assertion can change the clear meaning of this language.

After the sentence just quoted, the McClennen report goes on:

> "Indeed the decision quoted indicates that because the General Assembly cannot delegate its legislative power and duty to have the State perform its obligation under the Constitution of the United States, such vote of the people would be unconstitutional under the Constitution of Illinois."

The decision in the Barnett case, even in the language quoted by the Special Master, states that all legislative power has been vested in the General Assembly "except in those cases in which the power has by express limitation or necessary implication been withheld." The constitutional provision above noted is clearly and definitely one of the exceptions referred to in this expression.

An analysis of the Master's Report will show that his entire reasoning as to the propriety of an injunction controlling the legislative discretion of the General Assembly of Illinois in the manner indicated, is based and founded completely upon his erroneous assertion that all legislative power of the State is vested in its Legislature. Since this premise is wrong, his conclusion cannot be accepted. If the court is to adopt the remedy recommended by the Master, it must direct the exercise of the legislative power of the State in the manner in which the people of the State have expressly and definitely decided

in their constitution it must be exercised. Legislative power in Illinois for the creation of a debt and provision for its payment is to be exercised in part by the General Assembly and in part by the people of the State. From mere considerations of convenience, this court possesses no judicial authority to set aside this provision; if the court desires to adopt this recommendation it must modify the Master's recommendation and make its mandate run not only against the General Assembly of Illinois, but also against the people of Illinois. The utter impracticability of attempting to coerce and control a popular vote of the people of Illinois eliminates this suggestion from serious consideration, but this court, even though the method embodied in the Illinois Constitution may seem in this instance impracticable, has no power to rewrite the Constitution and substitute some other mechanism for the method chosen by the people of Illinois within their exclusive sovereign right.

C.

SPECIAL MASTER MC CLENNEN RECOMMENDS THAT THIS COURT, BY MANDATORY INJUNCTION, DIRECT THE GENERAL ASSEMBLY OF ILLINOIS TO DISREGARD AND DISOBEY CLEAR AND SPECIFIC REQUIREMENTS OF THE CONSTITUTION OF ILLINOIS. THIS INVOLVES THE EXERCISE OF POWER NOT CONFERRED UPON THIS COURT AND BEYOND THE LIMITS OF JUDICIAL AUTHORITY.

As shown by the summary of conclusions in the report at page 128, the Special Master recommends an addition to the decree providing that the State of Illinois be enjoined to appropriate $35,000,000.00 for purposes stated "and to incur indebtedness therefor and for the purposes aforesaid and no other to issue and to sell bonds of the State of Illinois for the amount so appro-

priated and on such terms of payment and maturity and at such rates of interest as the General Assembly shall determine and without the laws authorizing the same being submitted to the people of Illinois and the said laws shall be valid and the bonds so issued if in other respects conforming to the Constitution and laws of the State of Illinois shall be valid obligations of the State of Illinois notwithstanding the fact that said laws have not been submitted to the people of Illinois either theretofore or thereafter. * * *"

In view of the provisions of Section 18 of Article IV of the Illinois Constitution above quoted requiring the submission to vote of the people at a general election of a law providing for the creation of a debt and for the levy of a tax to pay the same, and in view of the statements in the report, there can be no question about the specific fact that the Special Master recommends this Court direct and require a violation of the Constitution of Illinois. The reasoning of the Special Master is, that all legislative power is reserved to the Legislature and, therefore, that the constitutional requirement in question should be disregarded, since, as he views it, it is appropriate and necessary that the legislative power be exercised to meet what he calls an obligation arising under the Constitution of the United States. This is, we submit, a fair paraphrase of his reasoning.

In the first place, we are not aware of any judicial process which permits discriminating between constitutional provisions and classifying those which must be regarded and those which can be rejected because of inconvenience. Certainly no such authority or power has ever been asserted by this court.

We repeat the only excuse for the suggested assertion of power the Special Master urges upon this Court is the claim by him that, since all judicial power is vested

in the Legislature, the requirement of popular vote, even though specifically demanded by the Constitution can be disregarded. As might be expected, he cites no authority whatever in support of this reasoning.

Frequently throughout his report, however, Special Master McClennen refers to the expressions contained in the last opinion in this case written by Mr. Justice Holmes in which he said (281 U. S. at p. 197:

> "It already has been decided that the defendants are doing a wrong to the complainants, and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defenses upon difficulties that it has itself created. If its Constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state."

These expressions, broad as they are, and with all due deference to the illustrious Justice, for whom the State of Illinois has a peculiar respect, far beyond any assertion of power ever heretofore uttered by this Court, do not necessarily involve any such claim of power as would support the suggestions of the Special Master.

Mr. Justice Holmes was dealing with the case as it then stood. The Sanitary District had defended its acts as justified under a permit from the War Department running to the Sanitary District, not to the State of Illinois. The Court had found the permit valid, but based upon a self-created emergency resulting from wrongful acts. The Court was contemplating the issuance of an injunction against the Sanitary District to prevent the continuance of these wrongful acts any longer than was needed to meet equitable and humanitarian requirements. The acts were those of the Sanitary District in making the diversion. This was a bill to enjoin a nui-

sance, and the State of Illinois related to the Sanitary District as the source in part of its powers and authority, was properly joined as a co-defendant in order that any injunction allowed should afford complete and comprehensive protection from wrongs determined. It was in the light of these circumstances that the above remarks, clearly *dicta* as not involved in the issue before the court—were uttered. There were in fact no obstacles created by the State of Illinois to performance of the decree to which either court or counsel, in brief or argument or opinion, had called attention. The language can only be regarded as a warning against any technical interpretation of the Constitution of Illinois to be suggested as a bar to carrying out the decree then to be entered.

We are sure this Court will agree that Mr. Justice Holmes would never have attempted to suggest in advance what this Court would decide upon a subsequent issue properly joined and before the Court for decision.

Dealing literally with the last sentence in the above quotation, this sentence merely suggests a choice which might be presented to the State of Illinois, of amending its Constitution or finding itself subject to the exercise of a paramount authority. In view of the nature of the issue presented, the paramount authority referred to was not the judicial power of this Court, but the power of Congress to regulate and control diversion, a power asserted in this very case. We have shown in fact that Congress has now exercised its paramount authority in a way which limits the jurisdiction of this Court in this proceeding.

The real question is whether this court, under the circumstances of this case, can or should exercise authority to set aside and disregard the Constitution of Illinois.

These constitutional provisions were adopted long before any of the circumstances here involved arose. They are not self-created obstacles, selected for the purpose of avoiding performance of this Court's decree. They are essential elements in the structure of government, erected by the people of Illinois in the exercise of a right, which, under our laws and organization, must and always has been held to be free. Exercise of this right is subject only to the requirement that the form of government be republican in its nature and contain no limitations upon the meeting of obligations to be assumed by a state under the federal constitution.

It is the claim of the Special Master that the obligation here involved is an obligation imposed upon the State by that constitution. An analysis of the record completely negatives any such conclusion. The Court is not seeking to compel here the payment of an obligation to sister states, or the performance of a duty to those states. The Court has entered an injunction enjoining wrongful acts performed solely by the defendant Sanitary District. That injunction satisfies the rights of the complaining states. The court has found that immediate compliance with the injunction will endanger the lives and health of many innocent people. Because of this consideration it has postponed and graduated compliance with the injunction in order to give the people to be affected by it an opportunity to protect themselves from these dangers. Circumstances beyond their control have prevented and delayed the progress and completion of this protection. It is now suggested that the Court invade the rights of these people, set aside their constitution, in its essence reconstitute their properly self-originated form of government in order to compel these people to protect themselves.

The duty to protect themselves is, we submit, no duty imposed upon the people of Illinois or upon the people of the Sanitary District by the Constitution of the United States. *But the proposed decree in its essence requires the performance of that duty* and no other. The injunction, we may assume, must be carried out according to its terms unless this Court, recognizing the same impelling humanitarian necessity again postpones performance. The obligation to protect themselves, however, is a domestic obligation solely within the proper scope of the reserved powers of the State of Illinois, and not a matter concerning which this Court or the complaining states have either interest or jurisdiction.

The decree herein was not mandatory in its terms, so far as the program of self-protection was concerned. Such a decree was recommended by the former Special Master on rereference and this recommendation was rejected by the court. We must assume the Court's refusal to adopt this recommendation was due to a recognition by the Court of what, we submit, is the unquestioned fact, that the legal power, as well as the obligation to protect themselves, rested in the people of the Sanitary District. The very existence of this power implies a discretion as to its exercise. That this Court in its decree, and particularly in its opinion in the expressions above noted, indicated a clear and settled determination to protect the rights of the complaining states does not import into the decree any mandatory requirement effective upon the people of the Sanitary District or the State of Illinois. This omission is clearly a recognition of the right of the people of the district to decide for themselves.

Putting the question in its most direct way, we submit this Court now confronts a choice of three alternatives: First, to leave the injunction as it is without modifica-

tion and leave the people of the Sanitary District to suffer the consequences of their misfortune in not being able to go forward with their program of self-protection; Second, the Court, recognizing the equities which, we submit, should prevail from the fact that this interruption in providing self-protection is due solely to the general economic depression from which the entire country is suffering, should postpone, until recovery can be had, compliance with the decree; Third, the Court, in order to give to the complainants speedily the relief to which they have been held entitled without endangering the safety of the people of the Sanitary District, shall take away from those people their lawful constitutional rights of government and self-determination and itself shall take over and exercise governmental authority for them.

We submit this last alternative is not consistent with judicial procedure and does not involve the proper exercise of judicial power.

The 10th Amendment to the Constitution of the United States specifically declares:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Sanitation is a domestic power, exclusively within the police authority of the states, except only in so far as Congress, in the exercise of control over interstate commerce, may deal with the subject.

This court has decided the rights of the complainants and has awarded them an injunction. It applied principles not only of equity but common humanity to the facts as found by it and adjusted the injunction so as to allow to the district the opportunity the court found they possessed within their own powers and organization of gov-

ernment to so adjust their affairs as to avoid danger otherwise certain to result from the injunction. Even though the court may be impelled by the same appealing consideration for welfare of life and health that originally moved it in this case, the strength of that appeal does not vest in the court any power not originally possessed by it. In its essence the problem is for the people of the Sanitary District, as empowered by the State of Illinois, and for them alone to deal with.

We feel justified, however, in view of the finding of the Special Master that the interruption in the program of self-protection has occurred through no fault of these people, in again pressing upon the consideration of the court the necessity for delay. In view of the principle so often asserted in litigation other than this that the States of the United States stand before this Court, when it exercises its jurisdiction to settle controversies between them, upon a plane of equality and in view of the way in which this court has always heretofore in this as in all other cases balanced the equities and conveniences in the conflict of rights presented in these controversies, we confidently believe the court will recognize the necessity of accommodating its original decree to the changed circumstances set forth in the Special Master's Report. We are equally confident, however, that as a means of accommodating its decree to these requirements, the court will not attempt to assert powers not clearly vested in it by the fundamentals of judicial procedure and the requirements of the Federal Constitution.

Conclusion.

We summarize our contentions as follows:

We deal only with the third question submitted to the Special Master by the order of reference, although affirming and joining in the contentions submitted by counsel for the Sanitary District as to the first two questions.

1. We assert, notwithstanding the interruption to the construction program of the Sanitary District, which has occurred without its fault, there exists no such emergency for the giving of relief to the complainants as requires the extraordinary measures recommended. This emergency is lacking. It clearly appears by act of Congress adopted since the decree herein, lake levels are in process of restoration and will be restored at a date sooner than if the original decree were accomplished. This result is also required by the pending Canadian Treaty.

2. We assert for numerous reasons that the recommendations of the Special Master do not meet the requirements of this court that they be "reasonable." They are in fact impractical and would in all probability completely fail to produce any increase in speed of performance of the self-protective program of the Sanitary District. We further show that the State of Illinois in all probability does not possess financial capacity to assume the burdens the Special Master would impose.

3. We point out that this litigation has dealt with the Sanitary District as the active defendant, the State of Illinois being joined in order that the injunction sought to prevent nuisance may be completely effective. We analyze the acts of the State of Illinois in the premises and show that it proceeded originally within its right.

We assert that so far as the State is concerned, if it be regarded as the author of the diversion, its act is wrongful only to the extent the diversion exceeds the share of Illinois in the waters of Lake Michigan to be determined by applying the doctrine of equitable apportionment of those waters as between Illinois and the complaining states. We point out that this doctrine, applied in all other cases, has never been the measure of decision herein. We insist that before the liability of the State of Illinois be determined, the right of this sovereign state to the application of this settled principle is clear, and proper proceedings to determine what is an equitable apportionment of the waters of Lake Michigan should be had.

4. Disregarding all other considerations, we assert that the recommendations of the Special Master ask this Court to exercise powers not judicial in their nature and not within the authority of the Court to settle controversies between states. We contend it does not lie within the essence of judicial power to control and direct an exercise of legislative discretion by the Legislature of the State of Illinois and its government. We point out that the legislative authority, which must be exercised to carry out the Special Master's program under the Constitution of Illinois, is not solely exercised by the Legislature, but is primarily reserved to the people of Illinois, and if the Court is to control and direct this proposed exercise of the legislative authority of the State, it must not only control action by the General Assembly but also by the people of Illinois in a general election required by its Constitution. We insist that this Court possesses no authority to set aside the constitutional requirements of the State of Illinois. We point out that the recommendations merely involve an exercise by the people of the

Sanitary District of the power to protect themselves against sewage evils. This power is in its essence an exercise of the reserved police power of the State. It is not a power which can be exercised, either by the Congress or this Court. Since the State of Illinois exclusively possesses this reserved police power, it follows necessarily that it possesses discretion to decide whether it be exercised or not. Even though a decision not to exercise the power would be unwise and contrary to the interest of the people of Illinois, this Court cannot control that discretion.

Here the decision not to exercise the power in the manner needed to accommodate the decree herein has been forced upon the people of the State of Illinois by circumstances not within their control. The equities of the situation demand a further postponement of the reductions in diversion.

We respectfully urge, therefore, that the recommendations of the Special Master should be rejected. We submit that on principles of comity and equity under the circumstances in this case, the Court now should not enter any additional order whatever. As pointed out by the Sanitary District, in all probability with complete safety the reduction in the diversion to 5000 c. f. s., required at the end of 1935, may be safely made, since, by the uncontroverted testimony in this case, only a relatively small sum need be expended to afford the complete protection adequate to this reduction. This reduction will cut in half the damage produced by the division. Reports will continue to be filed and these will deal in more detail with the financial condition of the Sanitary District. The future will disclose its increase in capacity to go forward with the construction program and, based upon the future, a matter now incapable of determination, an appro-

priate extension of the reduction in 1938 may, if then needed, be made. In the meanwhile the determination of Congress as to the amount of diversion for navigation will have been reached.

Respectfully submitted,

OTTO KERNER,
Attorney General,
TRUMAN A. SNELL,
Assistant Attorney General.
CORNELIUS LYNDE,
Special Assistant Attorney General.

We further point out to the Court that the contentions herein advanced, particularly under the third point of this brief, as to the effect of the Rivers and Harbors Act of 1930 and the navigation necessities for diversion on the waterway from Chicago to the Gulf, are the contentions which the original intervening defendant states of Missouri, Kentucky, Tennessee, Arkansas, Mississippi and Louisiana have heretofore sought permission to present to the Court. The application of these states was made upon the express approval obtained in reference to this present proceeding from their respective Attorneys General. We, therefore, renew the application on behalf of those states and they join in the contentions in this respect herein submitted.

Respectfully submitted,

J. W. CAMMACK,
Attorney General of Kentucky.
G. L. RICE,
Attorney General of Mississippi.
JAMES O'CONNOR,
Attorney General of Louisiana.
STRATTON SHARTEL,
Attorney General of Missouri.
L. D. SMITH,
Attorney General of Tennessee.
H. L. NORWOOD,
Attorney General of Arkansas.

CORNELIUS LYNDE,
Of Counsel.

APPENDIX.

DIRECT TESTIMONY OF GOVERNOR HENRY HORNER GIVEN AT THE EXECUTIVE MANSION, SPRINGFIELD, ILLINOIS, FEBRUARY 28, 1933. (Tr., 1971 to 1987, inclusive):

The Witness: If the Master please, my attention was called last Tuesday for the first time to the very serious and grave nature of the unusual, and I might say, shocking, recommendations which I am advised that the Special Master has under consideration for possible submission in his report to the Supreme Court of the United States in the Sanitary District controversy.

When this was called to my attention by the Attorney General, I had been engaged in studying the financial survey of the state, memoranda upon which had been handed me for the first time a few days previously. I had selected Mr. Rice, a very competent gentleman, and well-known financier, to look into our financial condition, because of my knowledge of his capacity and ability and sound judgment in these matters, to prepare a survey and had assigned to him all of the assistance the executive could command. Before the survey was completed, I had formally appointed him Director of the Department of Finance. Although not an audit, the survey was prepared, I am advised, with as much possible care, considering the requirement of having it rapidly available, as if it were an audit. I am further advised that Mr. Rice testified as to certain facts on yesterday, as the result of his findings.

I have no hesitancy in saying that this audit reveals a grave situation, so far as the state finances are concerned.

Mr. Jackson: If the Master please, may I interpolate: I should feel compelled to move to strike out the characterization of the Master's tentative recommendation and the eulogy of Mr. Rice, whose qualifications have been shown in a prior hearing, and I do not think can be buttressed by any other witness, and the conclusions and characterizations of what is shown by this report. To the extent that that may be material at all, it is a matter for the Special Master to find, and it seems to me mani-

fest, that no witness, however eminent, can in testimony characterize what is in the record before the Master.

The Master: I think nothing has been stated so far that you need feel called upon to meet in any way.

The Witness: I have no hesitancy in saying that this audit reveals a very grave situation, as far as the state finances are concerned. With a deficit in available cash of $8,000,000 at the beginning of the year—and remember, I was inaugurated on January 9th of this year—and even allowing for material economies already adopted, established and in force, an ultimate deficit at the end of the year of $15,000,000, it is quite apparent that the state is approaching the danger point where its credit will be impaired. The only way in which our state can function now at all, and during the year, is of borrowing from special funds and by selling tax anticipation warrants. Even to meet the most drastic emergency, under the constitutional requirements, bonds cannot be sold except upon approval by popular vote at the next general election, which will not be held until November, 1934.

In my contract with bankers, since taking office, with many representatives of business interests throughout the state, members of the legislature, and my own general experience, I am convinced that the possibility of sale of tax anticipation warrants depends very largely upon our success in collecting general revenue taxes.

I am informed that the record in this case contains evidence as to the tax difficulties in Cook County, but I am also informed that this evidence has dealt more particularly with legal difficulties. It has not sufficiently recognized, as a controlling element in the problem, the effect of the business depression upon the capacity of taxpayers in Cook County and elsewhere to pay taxes. It is my belief that this element is a most important one for consideration at the present time. Under the system of taxation in Illinois, required by our Constitution, the bulk of the general revenue comes from the general property tax; more than fifty per cent of the taxable property of the state is found in Cook County, and the business depression has combined with the difficulties of tax collection to affect real estate values there in a most drastic way. As a matter of fact, real estate, whether in

the form of business property, the farm or the home, cannot now bear the present excessive tax load.

I view with dispair the likelihood of collecting large amounts of delinquent taxes, and anything like a normal proportion of 1931 and 1932 levies.

The legislature is composed of a majority in both houses of representatives and senators elected from so-called downstate counties. The attitude of our people downstate, who are suffering from the business depression almost as much as those in Cook County, and so far as the farmers are concerned, to a greater extent, must be given consideration when it comes to all practical measures of taxation, and measures tending to solve our tax difficulties. I assume that the Special Master and all those who have studied, or are studying, the Illinois problem, are familiar with this.

The City of Chicago, located in Cook County, is one of the greatest industrial centers of the world. Unhappily, there are many residents and legislators of our downstate population who take the position that there is a difference in point of view between the two sections. Yet, I am hoping the rest of the state eventually may recognize Cook County's difficulties, for it has sympathized with its difficulties in many respects. I feel quite sure, however, that the rest of the state will not be willing to assume any of the local burdens of the Cook County or Sanitary District government.

We have a very disturbed condition in the mining industry of our state, one of the greatest industries in the state. For the past months, one county is being policed by state militia, and within the last few days I have had to order three companies of militia into this very county, where we are now meeting, Sangamon County, where the Capitol of the state is located. To prevent a general conflagration among the miners of the state, this matter must be rapidly and efficiently dealt with.

Bloodshed and destruction of property has already occurred. You can well understand the difficulties of such a situation in the present unhappy state of the people's minds, and its direct relation to the financial problem of our state. The present cost of militia maintenance is $3,000 or $4,000 daily, and no one can say to what extent that may increase.

I am convinced from my contact with people of all kinds and callings throughout the entire state, that one of the most important problems we confront is the essential reduction in governmental expense, with an ultimate reduction in taxation.

This mining controversy, which, by the way, has been punctuated with general riots and like disturbances, is not the only serious problem of its kind. In one county, we have a situation where the farmers have armed themselves and formed large bodies which are preventing the functioning of the courts in foreclosures. Many of these foreclosures have their origin in tax defaults because of the inability of the farmer to pay his taxes. Just to what extent this will spread, I cannot tell, but it is one of the serious problems of the state.

Need I stress here the effect that banking disturbances in the nation, including this state, is having on our state problem?

These are only a few of the considerations which suggest themselves. Any proposal to be submitted to the legislature, involving the assumption by the entire state of the cost of what the entire state has always heretofore regarded as a local problem in Cook County, that is the sewage disposal construction program of the Sanitary District, is one which would be regarded as unthinkable and not to be contemplated seriously under existing conditions by anyone who really knows the facts in this state.

Another great problem which confronts the State of Illinois at the present time is the unemployment relief. We are doing our utmost in this respect, but our financial capacity under existing conditions to meet bare necessities of human needs, seems utterly insufficient. So far, we have been able to do so by the help of the federal government. The nature of this problem, the constant appeal which must be made to the legislature in this connection, makes it one which every person in official responsibility knows. Without regard to any other consideration, in my opinion, it must come first.

Approximately 800,000 persons throughout our state, by reason of widespread unemployment, have become entirely dependent upon private and public relief, and, of course, have enlisted the sympathetic interest and con-

cern of both state and federal governments. At first, our efforts in Illinois were made to give aid through private subscriptions and agencies, and through local public charities. When those resources were exhausted, and they were shortly, every possible method was devised to meet the almost ghastly situation. Through the Illinois Emergency Relief Commission, with the aid of the Reconstruction Finance Corporation, public funds have been used to an almost fabulous extent. More than thirty odd million dollars have been furnished alone by the Reconstruction Finance Corporation.

Our relief representatives are now in Washington, seeking some six and one-half millions, or thereabouts, which, as I understand it, is the last moneys Illinois will be entitled to receive under the provisions of the present Reconstruction Finance Corporation fund. If we get this, and it has not yet been allowed—I just heard from Mr. Ryerson yesterday evening by phone, although I am inclined to think it may be—it will carry us only through the month of March. What is to be done after that, no one can now say.

It is not difficult to imagine the possibility of bread riots, and like difficulties, in the large centers of this state, where relief is not available and unemployment still continues. We are trying to meet the necessity for relief by a sales tax, which has already gone through our State Senate, and is now under consideration by our House of Representatives, and we are not sure of easy sailing by any means in that house.

With these difficulties facing the state entirely on the problem which deals so intensely with human sympathies, you can well imagine the insurmountable difficulties our state would have in carrying an additional burden resulting from asking the entire state to bear the cost of an obligation which the Supreme Court has fixed upon a limited locality in the state, such as the Sanitary District.

Of course, we cannot permit our fellow-citizens to starve, nor to deny them shelter, clothing and the mere sustenance of life. And, mind you, they are not those that are usually dependent upon charity; they represent hundreds of thousands of fine men and women, who are well and anxious to work, but who are so situated because of general unemployment. Notwithstanding what

the record in this case may have implied, I cannot believe that the sister states of Illinois are willing to destroy entirely the hope of our state in our effort to extricate ourselves from our present catastrophe. Personally, I know little about the origin of the tremendous amount of litigation of which this present hearing is an outgrowth. My search for information, since the matter has been brought to my attention within the last weeks, has brought to light the fact that there never has been a conference between the respective states regarding any liability or obligation of the State of Illinois in the whole matter. These are times when harmony of action by all the states is necessary to meet the constantly multiplying problems of the nation, and I cannot therefore fail to express wonderment that no conference between the states interested in the controversy has been called. And I say this, for I propose at a reasonably early date to try to bring about such a conference. It seems to me that honest and earnest efforts should be made by the states interested to adjust their controversies before the United States Supreme Court is asked to pass further upon these interstate political, economic and local problems, in so far as they affect the states.

I have suggested very briefly a few of the practical considerations which in my opinion demonstrate the impracticability, yes, the impossibility, of the recommendations under consideration by the Special Master. It may be that the inquiry addressed to the Special Master by the Supreme Court called for a survey of those possibilities. However, whatever the court's view on that subject may be, surely that court will also give consideration always to practical problems, and I cannot conceive that the court will determine upon any action without the essence of its actions being influenced by the possibility of performance. I have no hesitancy in saying that, unless conditions rapidly and marvelously change for the better, the capacity of our state to find a market during each of the next four years for thirty-five millions of bonds, if such an unusual thing were required by the court, is an impossibility. This would be so even without the other present and future financial necessities of the state.

I am not sure what the scope of your inquiry may be, except as I have just heard it from the Master. It is,

of course, difficult for me to comprehend how it is possible for any court to impose upon our state responsibility for the obligations of a local tax-spending municipality like the self-controlling Sanitary District.

Any recommendation of the Master of this character calls for action by the Legislature of Illinois. It would be a mandate to direct and control the legislative discretion of the General Assembly of Illinois. Aside from what seems to me the clear illegality of any such proposal under the circumstances of this case, I cannot conceive how such control could be made effective. Notwithstanding the fact that every right-thinking citizen of this country recognizes the importance of the Supreme Court as a paramount factor in our structure of government, and the dignity and weight which must be attached to its conclusions, the practical problems which would confront each member of the General Assembly must inevitably receive consideration by the court in this case. Aside from the necessity of opposing tax increases beyond the ability to pay, a necessity which is not a matter of sentiment at the present moment, but one of compelling force, is the humanitarian problem of unemployment relief, which in my judgment comes first.

May I interpolate here a suggestion that must never be lost sight of in the relation of the federal government and its courts to a sovereign state? At the cost of blood and war, our nation has definitely and forever determined that one state may not destroy the Union. It is equally important to the perpetuity of our constitutional form of government that the United States cannot destroy a state. Any action by the court in this case, to destroy Illinois financially, will have that effect. It should be needless to add in this record that the power to tax may also be the power to destroy.

It always has been the fundamental political philosophy of the State of Illinois to accord to local communities local self government. This is reflected in our Constitution in that provision which gives to local corporate authorities elected by the people control over local taxation. Surely, the recommendation of the Special Master, aside from other considerations, ought not contemplate such a destruction of this fundamental of Illinois government and thus run counter to every trend of political thought and habit in this state. Surely, no incident in

the long history of our state has given any justification for the thought by any fair mind that our state, as a sovereign member of the Union, has failed to carry out any valid obligation to any sister state and to the nation. We do not consider the obligation of the Sanitary District of Chicago the obligation of the State of Illinois.

Frankly, I question the power of the Supreme Court to set aside the Constitution of the state; or that it possesses authority to control the legislative discretion of its General Assembly. With this belief, which is shared by our Attorney General and our counsel in this case, I would view with grave apprehension any attempt on the part of the court to exercise such a power. In a period when the entire world is suffering from an economic catastrophe, and when it is frequently said that the very structures of our civilization are being attacked, and in some localities are weakening, I believe it would be a grave misfortune to have the State of Illinois put in a position where its own dignity and its right of self-determination was denied, and it founds itself incapable of complying with and according respect to any mandate or judgment of the Supreme Court of the United States. I cannot believe that the Supreme Court will go as far as the petitioners in this case suggest.

It is apparent that the decree must be modified in order to give more time to the Sanitary District for its accomplishment. When economic conditions improve, tax revenues will undoubtedly increase, and, as shown by the experience of the past, the Sanitary District then ought to be able to finance its own program.

The state is financially unable to assume this burden of the Sanitary District, and even if it were, it ought not, in justice, be asked to do it.

Those are the facts. Whatever theoretical arguments may be possible to support the theory of the petitioners, so far as the State of Illinois is concerned, practical considerations themselves deny the possibility of such theory.

Mr. Lynde: You may cross examine.

Mr. Jackson: If the Master please, I desire, on behalf of the complainants, to make a separate motion to strike out each and every sentence in the statement read by

the witness, upon the grounds that the statements are irrelevant; that the testimony offered is wholly incompetent; that it is largely hearsay; that it is wholly argumentative; that it undertakes to make conclusions of fact and law which invade the province of the Special Master, undertakes to state as a matter of evidence conclusions of law and fact which would be found and made by the Special Master, if material; that it undertakes to express opinion evidence without any qualifications shown on the part of the witness to express an opinion, and upon subjects which are not susceptible of opinion evidence.

The Master: As I said earlier in the case, anything which I would strike out on the ground that it was not admissible, I should ignore if it was left in. I see no advantage in dealing in detail with the different statements. It is true that there is a good deal in it that is argument, rather than testimony; it is argument of a character which it would be proper for counsel for the State to address to me, and in its substance, although not in the same phraseology, counsel for the state have already presented such arguments. It seems to me that those arguments are things which, as arguments, I should consider in this case, and give them the weight that in my judgment they prove to be entitled to.

Mr. Jackson: My objection does not go to them as an argument, whether it is irregular or otherwise in that respect, but merely so far as they may purport to state facts which, if evidence, in the regular course, would be something that might be susceptible of rebuttal.

Mr. Lynde: There is a good deal that can be said in reply to Mr. Jackson's objection, but I want to point to one consideration. Your Honor's recommendations, or those at least which are under consideration, or suggested here in the tentative report, impose on Governor Horner, in connection with his constitutional responsibility, action on matters which he must decide which he is called upon to give consideration to, not only officially as executive of the state, but also in connection with the advice which he, as such, is called upon to give to the legislature. Now, I submit that his opinions, or that matter which might be referred to as argument, as illustrative of the official mind, from the viewpoint which he must have in dealing with this matter, is competent evidence for your Honor to consider, because it presents

necessarily a picture of the future which must be before him when those things, if they are to be done, are attempted to be carried out. I submit they are the very essence of the matter which the court in its wisdom must give consideration to in deciding on the propriety of the recommendations of this nature. There are other things that can be said, but it is from that standpoint and with the idea of carrying out what I conceive to be our idea to the court, because this testimony is a fair statement of the situation which prevails in this state.